No. 8[redacted]176

FILED
FEB 2
WM. R. STA[illegible]

Supreme Court of the United States

ATLANTIC COAST LINE RAILROAD COMPANY, Petitioner,

vs.

STANDARD OIL COMPANY OF KENTUCKY, - Respondent.

PETITION FOR WRIT OF CERTIORARI.

ATLANTIC COAST LINE RAILROAD COMPANY,

HELM BRUCE,
THOS. W. DAVIS,
Counsel.

January 12, 1927.

WESTERFIELD-BOOTH CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner,*

vs.

STANDARD OIL COMPANY OF KENTUCKY, *Respondent.*

Counsel for Respondent, Standard Oil Company of Kentucky, hereby acknowledges receipt of notice of filing the within petition for *certiorari,* with a copy of the petition, printed record and supporting brief, this January 26, 1927, at Louisville, Ky.

CHAS. G. MIDDLETON,
Counsel for Respondent.

Supreme Court of the United States

ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner,*

vs.

STANDARD OIL COMPANY OF KENTUCKY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Petitioner, the Atlantic Coast Line Railroad Company, respectfully asks this Court to review on writ of *certiorari* a decree of the United States Circuit Court of Appeals for the Sixth Circuit in *Atlantic Coast Line Railroad Co.* v. *Standard Oil Company of Kentucky,* entered December 17, 1926, as shown by copy of the record therein herewith filed (R. 120). And as grounds for this request says:

The Standard Oil Company of Kentucky, a corporation of *Kentucky,* sued the Atlantic Coast Line Railroad Company, a corporation of *Virginia,* in the District Court of the United States for *Kentucky* (Western District) concerning rates charged in *Florida* for the transportation of petroleum products (fuel oil, gasoline, refined oil and lubricating oil).

Petroleum products are brought *by ships* from *outside* of Florida to Port Tampa on the *west* coast of

Florida, and to Jacksonville on the *east* coast. These products are then further transported from these two ports *by rail* to points in the *interior* of Florida.

The bill alleged that the railroad company (petitioner) charged *interstate* rates for the transportation of these products from the ports to the interior, whereas it should have charged *intrastate* rates, which are lower. It, therefore, prayed for an injunction for the future and an accounting for the past.

The Circuit Court of Appeals for the Sixth Circuit in an elaborate opinion, upon the authority of the *Sabine Tram Company case* (Texas, etc., Ry. Co. v. Sabine Tram Co., 227 U. S. 111), the *Chicago Stock Yards case* (Stafford v. Wallace, 258 U. S. 495), and *Baltimore & Ohio Ry.* v. *Settle* (260 U. S. 166) has held in the case at bar that the rail transportation from *Port Tampa* on the *west* coast of Florida to the interior of the State is but a continuance of the original shipment from Mexico, Louisiana, etc., carrying out the original and continuing intention of the parties, as it existed before the commodities started from their places of origin, and is therefore foreign or interstate commerce and should carry the interstate rates according to the tariff on file with the Commission.

But it has held that the rail transportation to the interior from *Jacksonville* on the *east* coast of Florida, as to gasoline and refined oil, is *intrastate* commerce and therefore should bear the lower intrastate rates.

This distinction in favor of Jacksonville against Port Tampa is based *solely* on the fact that at Jacksonville a *small part,* "about 13 per cent," of the two prod-

ucts mentioned is *used locally at Jacksonville,* and therefore, of course, stops there and does not go on through to the interior of the State. The Court thought this fact differentiated it from the cases above mentioned.

The Supreme Court of Florida, in *Florida Railroad Commission* v. *Atlantic Coast Line R. R. Co.,* and *Seaboard Air Line Ry. Co.,* 109 Sou. 656 (not yet officially reported), being a case *pending in Florida contemporaneously with the case at bar* in Kentucky and involving the very traffic involved in this case, petitioner *being a defendant in both cases and bound by both judgments,* has held that *all of the traffic* involved is intrastate, and has issued a mandamus requiring petitioner and the Seaboard Air Line to put in the intrastate rates on *all of the traffic* in petroleum products going to the interior of the State, whether through Jacksonville or through Port Tampa.

The result of the above mentioned rulings of the Circuit Court of Appeals for the Sixth Circuit in this present case, and of the Supreme Court of Florida in the mandamus case, is the following situation, which we submit should move this Court to grant the writ of *certiorari* requested, to wit:

1. The decision of the Circuit Court of Appeals in the present case requires the charging of one scale of rates (interstate) from Port Tampa to the interior, and a different and lower scale of rates (intrastate) from Jacksonville to the interior, under substantially the same circumstances and conditions:

2. The Supreme Court of Florida having by mandamus ordered petitioner to put in the intrastate rates on *all of the traffic involved,* whether from Port Tampa or from Jacksonville, petitioner is, therefore, in this dilemma:

(a) If it charges *interstate* rates on that part of the commerce which the Court in the case at bar holds to be interstate, and which under that decision it has a right to charge, it will be in contempt of the Supreme Court of Florida;

(b) On the other hand, if it obeys the Supreme Court of Florida and charges *intrastate* rates on that part of the commerce which the Court in the present case holds to be interstate, and for which it has a tariff on file with the Interstate Commerce Commission, it will violate the Interstate Commerce Act and will be subject to heavy penalties, unless it *gives up an adjudicated right* and withdraws its tariff and files another to correspond with intrastate rates.

3. The traffic involved in this commerce is very great, many millions of barrels of petroleum products per year, of enormous value. The railroads of Florida, the oil companies, the different ports and the public are vitally interested in a prompt settlement by this Court of the question involved. A decision by this Court on the nature of this commerce will be controlling on all courts, State and Federal, and will quiet—and is the only thing that will quiet—the great confusion now existing under the present status of the decisions.

We respectfully ask that the writ be allowed.

ATLANTIC COAST LINE RAILROAD COMPANY,

HELM BRUCE,
THOS. W. DAVIS,
Counsel.

CERTIFICATE OF COUNSEL.

I, Helm Bruce, do hereby certify that I am one of the counsel who have had active charge of the suit originating in the United States District Court of Kentucky referred to in the foregoing petition for *certiorari* and shown by the record filed with said petition; that I am familiar with said record; that I have read the foregoing petition; that I believe the statements in the petition to be justified by the record and that in my judgment the petition for *certiorari* should be granted.

HELM BRUCE,
Counsel for Petitioner.

CASES MENTIONED IN PETITION OR BRIEF.

Baltimore & Ohio R. R. v. Settle, 260 U. S. 166.

Florida R. R. Comn. v. Atlantic Coast Line, 109 Sou. 656.

Railroad Comn. v. Worthington, 225 U. S. 101.

Stafford v. Wallace, 258 U. S. 495.

Texas, etc., Ry. Co. v. Sabine Tram Co., 227 U. S. 111.

SUPPORTING BRIEF.

The opinion below (R. 121) has not been reported. The judgment sought to be reviewed was entered December 17, 1926 (R. 120), being a judgment by the Circuit Court of Appeals for the Sixth Circuit. The jurisdiction of this Court to review the same is conferred by Federal Judicial Code, §240a, as amended.

Assignment of Errors: The Court erred in holding that the transportation of gasoline and refined oil from Mexico, Florida and other places outside of Florida through Jacksonville, Florida, to the interior of the State is, as to the transportation from Jacksonville to the interior, intrastate commerce.

It appears in the proof (R. 80), though not in the pleadings, that "about 13 per cent" of the refined oil and gasoline coming to Jacksonville is used at Jacksonville itself, although admittedly 87 per cent goes on through to the interior of the State. The Circuit Court of Appeals thought this fact distinguished the traffic in gasoline and refined oil coming to Jacksonville from the cases it had cited, and under the authority of which it had held that the *same products* coming to *Port Tampa* and thence transported to the interior constituted parts of interstate commerce.

But we call attention to the fact that in the *Chicago Stock Yards case* (Stafford v. Wallace, 258 U. S. 495), one of the very cases relied upon by the Court, it must necessarily have been true that a very substantial part of the cattle which came to the stock yards *stopped in*

Chicago, and were bought and butchered and consumed in that great city with its millions of inhabitants. But notwithstanding this manifest fact, the Court held that "the stock yards are not a place of rest or final destination. * * * The stock yards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the west to the east and from one State to another."

Again, in the *Lake Cargo Coal case* (Railroad Commission v. Worthington, 225 U. S. 101), a case of the same class as those cited by the Court in its opinion, it appeared that of the coal shipped from the Ohio mines at the lake cargo rate some of it was "diverted en route and devoted to some other purpose"; and it further appeared that coal was "accumulated in large quantities at Huron and only taken out of the accumulated lots from time to time." These facts were urged upon the Court as showing that the commerce was not interstate commerce. But this Court responded to that suggestion by saying: "It must always be remembered that this 70-cent rate applies solely to such coal *as is in fact placed upon vessels* for carriage to beyond State points" (p. 108).

So in the case at bar. While it is true that a small part of the gasoline and refined oil coming to Jacksonville may stop there, yet it was known before these products started from their places of origin that the great bulk of them was to go on beyond Jacksonville, and the rates involved in this case apply only to the

87 per cent of that traffic *which does in fact* go on through Jacksonville to the interior.

HELM BRUCE,
THOS. W. DAVIS,
Counsel for Petitioner.

FILED
OCT 1 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 176.

ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner*,
vs.
STANDARD OIL COMPANY OF KENTUCKY.

No. 177.

STANDARD OIL COMPANY, INCORPORATED IN KENTUCKY,
Petitioner,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY, PETITIONER, IN NO. 176, AND RESPONDENT IN NO. 177.

THOMAS W. DAVIS,
Wilmington, N. C.,

WILLIAM MARSHALL BULLITT,
Inter-Southern Building,
Louisville, Ky.,

Attorneys for Atlantic Coast Line Railroad Company.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

Page

Jurisdiction 1
Statement of Case 2
Assignment of Error 15
Rates to be charged as result of decision of Sixth Circuit Court of Appeals 16

I. Points and Authorities 16

The application of the rates depends upon the essential character of the commerce and not upon its accidents or isolated incidents. The commerce is interstate and foreign and, therefore, only interstate rates can be applied....16, 19

A. The acts of plaintiff, Standard Oil Company, and its customers, in making yearly contracts for petroleum products to be delivered at interior points in Florida, of themselves, constitute interstate commerce 16, 22

Butler Bros. Shoe Co. v. United States Rubber Company (C. C. A.), 165 Fed. 1,
International Text Book Co. v. Pigg, 217 U. S. 91, 107,
Flanagan v. Federal Coal Co., 267 U. S. 222,
Spalding Bros. v. Edwards, 262 U. S. 66,
Lemke v. Farmers Grain Co., 258 U. S. 50,
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282,
Shafer v. Farmers Grain Co., 268 U. S. 189 .....16, 17

B. The question of where title passes does not determine the rate, and is of no materiality, but the intention of the parties, as shown throughout their course of business, governs.....17, 31

Penn. R. R. v. Clark Bros. Coal Co., 258 U. S. 456,

Page

Stafford v. Wallace, 258 U. S. 495,
T. & N. O. Ry. Co. v. Sabine Tram Co., 227 U. S. 112,
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498,
Swift & Company v. United States, 196 U. S. 375,
B. & O. S. W. R. R. Co. v. Settle, 260 U. S. 166 17

II. The movement of lubricating oil from Port Tampa, and the movement of lubricating oil, gasoline and kerosene from Jacksonville, both constitute interstate commerce and the reasoning of the Circuit Court of Appeals to the contrary is erroneous, because it makes the character of those movements to the interior depend not upon their intrinsic nature but upon the amount of the small percentage sold locally 17, 50

Western Oil Refining Co. v. Lipscomb, 244 U. S. 346,
Railroad Commission v. Worthington, 225 U. S. 101,
Peoples Natural Gas Co. v. Public Service Commission of Pennsylvania, 270 U. S. 550,
Binderup v. Pathe Exchange, 263, U. S. 291,
Douglas v. Southern Ry. Co., 216 Ill. App. 148-151 18

III. Decisions of the Interstate Commerce Commission 18, 69

Tampa Fuel Co. v. Atlantic Coast Line R. R. Co., 43 I. C. C. 231,
International Agricultural Corp. v. Director General, 60 I. C. C. 726,

Page

Alexander Grocery Co. v. Beaumont Sour Lake & Western Ry. Co., 104 I. C. C. 155 18

IV. Cases relied upon by the Oil Company distinguished 18, 75

Railroad Commission v. Worthington, 225 U. S. 107,
Texas, etc., R. R. Co. v. Sabine Tram Co., 227 U. S. 112,
Binderup v. Pathe Exchange, 263 U. S. 291,
Stafford v. Wallace, 258 U. S. 525,
Hanley v. Kansas City Southern Ry., 187 U. S. 617,
Lemke v. Farmers Grain Co., 258 U. S. 50,
Texas Transport & Terminal Co. v. City of New Orleans, 264 U. S. 150,
Swift & Co. v. United States, 196 U. S. 375,
Addystone Pipe & Steel Co. v. United States, 175 U. S. 211,
Sonneborn v. Keeling, 262 U. S. 506,
Penn. R. R. v. Clark Bros., 238 U. S. 506,
Southern Pac. Co. v. Arizona, 249 U. S. 472,
Arkadelphia Milling Co. v. S. L. & S. W. Ry. Co., 249 U. S. 134,
Penn. R. R. Co. v. Knight, 192 U. S. 21,
Gulf, Colorado & S. F. RR. v. Texas, 204 U. S. 403 . . . . . 18, 19

V. Oil cases from North Carolina and Florida . . 19, 87

Atlantic Coast Line R. R. Co. v. Standard Oil Co., 12 Fed. (2d) 541,
State v. Seaboard Air Line Ry. and Atlantic Coast Line R. R. Co., 109 Sou. 656,
Hamilton Shoe Co. v. Wolff, 240 U. S. 258,
Hughes Bros. Timber Co. v. State of Minnesota, U. S. (Decided November 23rd, 1926, and not yet officially reported.) 19

Conclusion 94

TABLE OF CASES.

Page

Addystone Pipe & Steel Co. v. United States, 175 U. S. 211 ..... 18, 79

Alexander Grocery Co. v. Beaumont, Sour Lake & Western Ry. Co., 104 I. C. C. 155..... 18, 74

Arkadelphia Milling Co. v. S. L. & S. W. Ry., 249 U. S. 134 ..... 19, 75, 83

Atlantic Coast Line R. R. Co. v. Standard Oil Co., 12 Fed. (2d) 541 ..... 19, 87

B. & O. S. W. R. R. v. Settle, 260 U. S. 166... 17, 44, 86

Binderup v. Pathe Exchange, 263 U. S. 291.. 18, 67, 76

Butler Bros. Shoe Co. v. United States Rubber Company (C. C. A.) 156 Fed. 1..... 16, 23

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 ..... 17, 23

Douglas v. Southern Ry. Co., 216 Ill. App. 147-151 ..... 18, 68

Flanagan v. Federal Coal Co., 267 U. S. 222.... 17, 23

Gulf, Colorado & S. F. Ry. v. Texas, 204 U. S. 405 ..... 19, 47, 56, 75, 86

Hamilton Shoe Co. v. Wolff, 240 U. S. 258..... 19, 91

Hanley v. Kansas City Southern Ry., 187 U. S. 617 ..... 18, 77

Hughes Bros. Timber Co. v. State of Minnesota, U. S. (Decided November 23rd, 1926, and not yet officially reported.) 19, 93

International Agricultural Corp. v. Director General, 60 I. C. C. 726 ..... 18, 70

International Text Book Co. v. Pigg, 217 U. S. 91, 107 ..... 17, 23, 24

Lemke v. Farmers Grain Co., 258 U. S. 50, 17, 18, 23, 78

Penn. R. R. Co. v. Clark Bros, Coal Co., 258 U. S. 456..... 17, 19, 31, 81

Penn. R. R. Co. v. Knight, 192 U. S. 21 ..... 19, 85

Peoples Natural Gas Co. v. Public Service Commission of Pennsylvania, 270 U. S. 550.... 18, 64

Page
Railroad Commission v. Worthington..... 18, 75
Shafer v. Farmers Grain Co., 268 U. S. 189.... 17, 23
Sonneborn v. Keeling, 262 U. S. 506..... 19, 80
Southern Pacific Co. v. Arizona, 249 U. S. 472..
19, 75, 82
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498..... 17, 38
Spalding & Bros. v. Edwards, 262 U. S. 66.... 17, 23
Stafford v. Wallace, 258 U. S. 525..... 18, 31
State v. Seabord Air Line Ry. and Atlantic Coast Line R. R., 109 Sou. 656..... 19, 91
Swift & Co. v. United States, 196 U. S. 375.. 17, 18, 78
Tampa Fuel Co. v. Atlantic Coast Line R. R., 43 I. C. C. 231 ..... 18, 69
Texas, etc., R. R. Co. v. Sabine Tram Co., 227 U. S. 112 ..... 18, 32, 76
Texas Transport & Terminal Co. v. City of New Orleans, 264 U. S. 150 18
Western Oil Refining Co. v. Lipscomb, 244 U. S. 346 ..... 18, 55
Statutes—Judicial Code, Sec. 240, as amended Exhibits 95

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 176.

ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner*,
vs.
STANDARD OIL COMPANY OF KENTUCKY.

No. 177.

STANDARD OIL COMPANY, INCORPORATED IN KENTUCKY,
Petitioner,
vs.
ATLANTIC COAST LINE RAILROAD COMPANY.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY, PETITIONER, IN NO. 176, AND RESPONDENT IN NO. 177.

OFFICIAL REPORT.

The case below is reported in 16 Fed. (2d) 441.

JURISDICTION.

The judgment sought to be reviewed was entered December 17, 1926 (R. 132), by the Circuit Court of Appeals for the Sixth Circuit. Petition for Certiorari

was granted March 21, 1927. The jurisdiction of this Court to review the decree below is conferred by Judicial Code, Sec. 240, as amended.

The question to be decided in this case is whether rates on petroleum products coming into Port Tampa, on the West Coast of Florida, and Jacksonville, on the East Coast of Florida, from Mexican and Louisiana ports, to be there transported by rail to interior points in Florida, is foreign commerce and whether on the rail transportation from said ports to interior points interstate, or intrastate rates are applicable.

STATEMENT OF CASE.

Throughout this brief the Standard Oil Company of Kentucky, Respondent in No. 176 and Petitioner in No. 177, will be styled as "Plaintiff," and the Atlantic Coast Line Railroad Company, Petitioner in No. 176 and Respondent in No. 177, will be styled as "Defendant," and wherever italics are placed in the brief they are ours unless otherwise noted.

Standard Oil Company of Kentucky brought a bill in equity in the United States District Court for the Western District of Kentucky against the Atlantic Coast Line Railroad Company, seeking an injunction to restrain defendant from charging interstate rates on petroleum products shipped from Mexican and Louisiana ports to Port Tampa, on the West coast of Florida, and Jacksonville, on the East coast of Florida, destined, as claimed by defendant, to interior Florida points, and for an accounting for overcharge (R. 2); and alleges that it is engaged in the business of buying and selling gasoline, refined oil, lubricating oil and other petroleum products which it purchases and sells to its customers in Florida, which, with the exception

of lubricating oil, is brought into Port Tampa and Jacksonville in steamers owned or chartered by sellers, which products are pumped direct from the steamer into storage tanks owned by plaintiff at said ports (R. 2). That the lubricating oil brought into Port Tampa, however, is pumped direct from steamers into tank cars and transported by rail in said tank cars direct to Tampa, Florida, or to its bulk stations hereinafter described (R. 5). That plaintiff maintains at a number of other points in Florida bulk stations, where it has storage tanks, and from which it delivers by tank wagon to customers in Florida. It has also service stations and customers which it supplies direct from bulk stations by tank wagon, but occasionally by tank car from Port Tampa (R. 4). That all shipments from Port Tampa are made to Florida points and that it does not know when it receives gasoline in its storage tanks, where or to whom it will be eventually sold, but does know it will go to some place and be sold to some one in Florida (R. 4). That lubricating oil is pumped direct from vessels to tank cars and shipped to Tampa, or to plaintiff's bulk stations at interior points (R. 5). That fuel oil is shipped to Port Tampa and unloaded in the same manner as gasoline, *but that ninety-five per cent of fuel oil is sold to customers in Florida on contracts made before the oil arrives at Port Tampa, and practically all contracts for fuel oil are made for one year* (R. 5).

That at Jacksonville, gasoline, refined oil and fuel oil is handled and sold exactly the same way as that received at Port Tampa, except some is shipped to Georgia and Alabama (Bill of complaint Par. Fourth (e), (f), (g), R. 6 and 7).

That lubricating oil is received at Jacksonville by tank steamers, pumped into tank cars and taken to

King's Road, about two miles across Jacksonville, pumped into storage tanks and about ninety per cent is barrelled at King's Road and shipped out to customers in barrels (R. 7). Plaintiff also alleges that it receives some lubricating oil at Jacksonville by rail in tank cars, and occasionally some lubricating oil and greases in barrels and cases, all of which is stored at King's Road to await orders in varying amounts from customers. It also alleges that it owns no tank cars but leases them from tank car companies or railroads. That it ships only carload lots from Port Tampa, but from Jacksonville ships both carload and less than carload lots (R. 7). Plaintiff alleges that up to June 15, 1923, the defendant charged intrastate rates on such products, but that on that date it began applying interstate rates, and contends that the commerce is intrastate and intrastate rates should apply, and asks for a judgment of $63,000.00 for the difference between the rates paid during the time alleged in the complaint (R. 8).

The case was heard before the District Judge and the following facts were brought out, all of the witnesses being witnesses for the plaintiff except the witness J. W. Morris, whose testimony appears at page 127, and the facts stated below are the facts shown by plaintiff's witnesses from the record, except where witness Morris' testimony is specifically called to the attention of the Court:

The Standard Oil Company of Kentucky purchases its crude oil from the Standard Oil Company of New Jersey, and a typical contract is shown (R. 55) for one million barrels of Mexican crude oil. This contract calls *for delivery in cargo lots over a period of one year from January 1, 1925, in fairly even monthly quantities,* and provides for the shipment and method

of paying. The capacity of the average steamer is 45,000 barrels. The storage capacity for gasoline at Port Tampa is 104,505 barrels, and at St. Johns River Terminal, Jacksonville, 162,500 barrels, and the approximate sale of gasoline from Port Tampa and Jacksonville for the first six months of 1925 was 93,100 barrels per month (R. 59). Plaintiff placed in evidence certain exhibits (R. 63 to 89, inclusive, and 90 to 109, inclusive), showing petroleum products received at Port Tampa and Jacksonville and each product shipped at these two places, but the totals are not shown on these exhibits. We give the tabulated figures below for gasoline and heavy fuel oil, both for the year 1925 and the total figures from July 1, 1923, to December 31, 1925. The figures from Port Tampa for the year 1925 are taken from Plaintiff's Exhibit No. 4 (R. 63), and from Jacksonville from plaintiff's Exhibit No. 5 (R. 77), and for the total from 1923 to 1925, inclusive, the total amount shown for 1925 plus the total shown on plaintiff's statements beginning on R. 94:

GASOLINE:

Received at Port Tampa 1925	647,268	bbls.
Shipped at Port Tampa 1925	695,419	"
Excess shipped over receipts, 7% (Plaintiff's Exhibit No. 4, R. 63)	48,151	"
Received at Jacksonville 1925	927,577	bbls.
Shipped at Jacksonville 1925	930,133	"
Excess shipped over receipts 2/10 of 1% (Plaintiff's Exhibit No. 5, R. 77)	2,556	"
Received at Port Tampa July 1st, 1923, to December 31st, 1925	1,302,312	bbls.
Shipped at Port Tampa July 1st, 1923, to December 31st, 1925	1,309,969	"
Excess shipped over receipts ½ of 1% (Plaintiff's Exhibit No. 4 R. 63 and statement R. 96)	7,657	"
Received at Jacksonville July 1st, 1923, to December 31st, 1925	1,936,271	bbls.

Shipped at Jacksonville July 1st, 1925, to December 31st, 1925	3,925,650	bbls.
Excess receipts over shipments 7/10 of 1% (Plaintiff's Exhibit No. 5, R. 77 and Statement E, 106)	14,823	bbls.

HEAVY FUEL OIL:

Received at Fort Tampa 1925	947,803	bbls.
Shipped at Fort Tampa 1925	905,822	bbls.
Excess shipped over receipts 4.4% (Plaintiff's Exhibit No. 4, R. 66)	41,981	bbls.
Received at Jacksonville 1925	1,438,190	bbls.
Shipped at Jacksonville 1925	1,402,256	bbls.
Excess shipped over receipts 2.7% (Plaintiff's Exhibit No. 3, R. 70)	35,933	bbls.
Received at Fort Tampa July 1st, 1925, to December 31st, 1925	1,071,903	bbls.
Shipped at Fort Tampa July 1st, 1925, to December 31st, 1925	1,030,347	bbls.
Excess shipped over receipts 4.1%	41,556	bbls.
Received at Jacksonville July 1st, 1925, to December 31st, 1925	1,771,598	bbls.
Shipped at Jacksonville July 1st, 1925, to December 31st, 1925	1,813,795	bbls.
Excess shipped over receipts 2.4% (Plaintiff's Exhibit No. 6, R. 79 and Statement E, 106)	37,807	bbls.

We give below statement of total amount of receipts and shipments of fire proof oil, or kerosene, from July 1, 1925, to December 31, 1925, as taken from plaintiff's exhibits:

PORT TAMPA:

Received	995,747	bbls.
Shipped	976,206	bbls.
Excess received over shipments 2% (Statement E, 96)	19,541	bbls.

JACKSONVILLE:

Received	897,183	bbls.
Shipped	871,966	bbls.
Excess received over shipments, 2.8% (Plaintiff's Exhibit No. 2, R. 76 and Statement E, 106)	25,216	bbls.

In order that the Court may see the regularity of the shipments of fire proof oil, or kerosene, we show in barrels the monthly receipts and shipments for the year 1925, as taken from Plaintiff's Exhibit No. 4, R. 63 and Plaintiff's Exhibit No. 5, R. 77.

	PORT TAMPA		JACKSONVILLE	
	Received	Shipped	Received	Shipped
January	—	6,780	13,393	13,413
February	6,877	6,847	10,197	13,054
March	10,054	9,394	10,508	16,398
April	7,861	10,274	16,654	9,950
May	7,773	13,087	10,984	10,954
June	—	6,370	16,654	10,730
July	5,389	7,861	13,981	6,382
August	13,989	7,808	—	10,253
September	—	13,250	13,250	13,250
October	12,216	6,394	13,397	16,794
November	7,913	16,213	16,394	16,861
December	16,859	16,677	12,501	12,980
	109,945	115,994	167,981	170,813

Barrels on hand in tanks—Port Tampa:
December 31st, 1924 ..... 10,700 (R. 63)
December 31st, 1925 ..... 3,660 (R. 63)
Barrels on hand in tanks—Jacksonville:
December 31st, 1924 ..... 13,500 (R. 77)
December 31st, 1925 ..... 1,050 (R. 78)

There is some difference in the method of handling these oils by the plaintiff at Port Tampa, *but there is one fact which is common to all of the products, and that is that none of them are used at Port Tampa*, the point at which they enter Florida, *and they all pass on through Port Tampa to other points in the interior of the state and this fact is known before the products are shipped into the state.* The plaintiff's chief witness, Mr. W. G. Violet, its Vice-President, testified: (R. 112): "*Some of these oils that come into Port Tampa are sold there. It is my understanding that it is all destined to other points in Florida.*" This testimony refers to all of the oil and was not limited or restricted

to any particular product or class of oil. Mr. Violet further testified that lubricating oil was pumped direct from ship into tank cars, for the reason that plaintiff has no storage at Port Tampa for lubricating oil. After it is pumped into tank cars most of it is shipped to Tampa, Florida (R. 60). Lubricating oils come to Jacksonville in the same manner as to Tampa but instead of being pumped into tank cars is pumped into storage tanks located on the St. Johns River Terminal and there reloaded or sent to Jacksonville or other stations. King's Road station at Jacksonville is plaintiff's marketing station for lubricating oil for Jacksonville and immediate vicinity, where they operate their trucks, have a warehouse and fill barrels, and the lubricating oil at King's Road plant is pumped from the tank cars into storage tanks the same as at Tampa and then distributed to its customers by tanks, trucks or in barrels. No barrelling is done at St. Johns River Terminal, *and lubricating oil is purchased under the same character of contract as gasoline at the primary points.* Plaintiff has in Florida 123 bulk stations at which it has small storage tanks, pumps, agents and certain facilities to sell it, together with 365 drive-in service stations and 5,000 gasoline dealers, to whom the gasoline is delivered by tank wagon. The bulk and service stations, in the majority of cases, get their supplies from Jacksonville or Port Tampa in tank cars (R. 62). He further testifies (R. 111) that the 123 bulk stations in Florida are at different points scattered over the state *and more than ninety per cent of this gas received at those points goes to its bulk stations.* All bulk stations it has *storage tanks* for certain grades, a pump house, underground facilities and *delivery* facilities. Its wagons operate out of these bulk stations in *making*

deliveries to customers. All tank wagons are supplied from bulk stations. Plaintiff has some carload customers, that is, tank car service. Most of the tank car shipments to customers come from Port Tampa and Jacksonville. The tank car customers vary in number *but are not many.* Most people buy direct from the stations. It has certain grades of lubricating oil *which it sells from the bulk stations.* Fuel oil is sold largely in the cities and towns and largely in towns in the Bone Valley District. *This fuel oil is sold largely on contracts made ahead of time with fuel oil customers* and they are supplied by plaintiff when they want it. He further testified *that ninety per cent or more of refined oil goes to the bulk stations.* At page 112 he says, "*None of these oils that come into Port Tampa are sold there. It is my understanding it is all destined to other points in Florida.* When lubricating oil is brought into Port Tampa and is shipped *it is pumped through pipe lines direct from the ship into cars—a whole train load—and carried away.* Fuel oil goes into fuel tanks and then is repumped from the tank into tank cars. Very little fuel oil goes to bulk stations" * * *. Referring to the Standard Oil Company of Louisiana, from whom it purchases oils, except fuel oil, he says (R. 112): "Sometimes they are delivering to us from three boats and at other times from only one. The oil we get from Mexico is bought from the Standard Oil Company of New Jersey. We do not charter the boat that brings it, it is bought by us at a price delivered. The only oil we get from there is a heavy fuel oil and this oil is sold to various cities and towns and to manufacturing industries down in the Bone Valley District." This Bone Valley District is about 60 miles Southeast of Tampa (R. 112). (The

record shows 60 miles Southeast of Jacksonville but this is an error.) "The tank cars are leased from the Union Tank Company. The railroads have no tank cars. *Port Tampa is simply an agency.*" (R. 112 and 113.) Plaintiff receives at its home office in Louisville, Kentucky, weekly inventories from its Jacksonville manager, showing the stock in storage tanks at Port Tampa, and from the information given of these inventories it calculates what supplies should be ordered for future requirements, taking into consideration market conditions to indicate whether it is advisable to increase or decrease the stock. Orders are then placed with the Standard Oil Company of Louisiana by plaintiff, designating the approximate time when delivery is to be made. The Louisiana Company acknowledges receipt of that order and shipments are made (R. 48). On pages 49 and 50 of the record is shown a typical copy of an order and of an acknowledgment.

Mr. Arthur M. Stephens, plaintiff's Traffic Manager, testified (R. 114) and placed in evidence a contract (Plaintiff's Exhibit No. 6) between it and the Union Tank Car Company for tank cars. This contract, Section 1 (R. 115) provides *for such cars as may be necessary for* the transportation of plaintiff's products. In Section 4 of the contract (R. 116), after providing for certain charges for the use of the cars, it provides: "In addition to the above charges to be received by the Car Company, any and all mileage allowed by the railroads *under the tariffs filed by them with the Interstate Commerce Commission* shall be collected and retained by the Car Company." Port Tampa is 10 or 11 miles from Tampa and *the rate from Port Tampa is a tariff rate*, as Port Tampa is not in the same switching district as Tampa (R. 120).

Mr. W. W. Zachary, plaintiff's District Manager testified (R. 120) "There are six or seven men employed at Port Tampa. About the only other equipment there besides the tanks are the pipe lines. *There is no office there; only a telephone station. The equipment at St. Johns River Terminal is very much the same* and about the same number of men are employed there." He placed in evidence plaintiff's Exhibit No. 7 (R. 121), which is the contract dated the 31st of October, 1924, between the plaintiff and the Florida Phosphate & Mining Company, calling for the sale to the latter of *50,000 barrels* of Mexican fuel oil *for delivery during the period of twelve months from November 15th, 1924.* Section 1 of this contract provides that the oil is to be used exclusively in the plant of the buyer at Royster, Florida, and must not be resold by the buyer. Section 2 provides that *the oil shall be received at the rate of approximately 4000 barrels per month.* Section 4 provides that the buyer shall pay the *import tax*, if any hereafter imposed by the United States. And in Section 5 it is provided that the buyer shall also pay the Mexican Government tax if it should be increased over 10 cents per barrel, and if decreased it is to receive the benefit thereof. Mr. Zachary testified (R. 123) "The fuel oil goes to the Bone Valley District and a great deal of it goes down on the East Coast, around Orlando and Lakeland and Deland and the middle of the state. *The rest of this is sold en route before it comes into the State.* Some of it is held subject to current demand, and there is no segregation between the two classes. It all goes into the same tank and comes out of the same tank. When a car-load comes in we do not know where it is going or when it is going. The deliveries under these contracts are

very irregular. They are requirement contracts—very largely so treated by both seller and buyer. * * * It is necessary for us to have a large storage in handling fuel oil. Our customers require it and I had some of them, *when I was trying to negotiate contracts,* ask how much storage facilities we have at our point of supply. They have to know if there is an adequate storage." Again, he states (R. 123) "At bulk stations we have tanks for storage of gasoline and refined oil and at points we have storage tanks for lubricating oil, and we have warehouses and truck tanks used for delivery, and we have tank wagons for gasoline and some for lubricating oil." He says (R. 124), referring to the selling of petroleum products: "*None of it is brought through Port Tampa or St. Johns River Terminal—no sales at all made there, or very little. Our fuel oil contract calls for a certain amount of barrels per month to be shipped each month as long as the contract lasts.* These estimates vary considerable. *But our custom is to be called on for a stipulated amount each month. I do not think it would be possible to conduct the business we have in Florida without these storage tank facilities. You could not get enough cars to handle the contracts—we could not hold the cars. It would be entirely impracticable to try to do business without a large reserve storage.*"

All of the above were plaintiff's witnesses. Mr. J. W. Morris, witness for the defendant, and its General Agent at Port Tampa for 22 years, stated that he was familiar with the methods of the oil companies at Port Tampa and, in general, he knew what was done at Tampa. That the Standard Oil Company, the Gulf Refining Company, the Seaboard Oil Company and the National Oil Company were all located at Port Tampa

and the Mexican Petroleum and Texas Oil Companies were at Tampa. That the products of all of these oil companies were distributed in the same way as the Standard Oil Company of Kentucky (R. 128). He says (R. 128): "*The flow of oil through the tanks is practically continuous. They are loading tank cars through the receiving tanks continuously throughout every day in the year, except Sundays.* * * * *Frequently oil is coming out of tanks at the same time it is being pumped into them by the ship.* I do not know who pays for the pumping. *The Standard Oil Company pays me the wharfage*, which charge is for the products passing over the wharf and includes the berth to accomodate the ship and wharf over which it passes." On cross-examination by plaintiff's Counsel (R. 130), he says: "I told you the wharfage is separate. It may be a part of the lease, but the rental of the land does not cover the wharfage. *The wharfage is governed by the regular tariff rates filed with the Interstate Commerce Commission.* * * * *There is no consumption of oil at Port Tampa and there is no oil produced in Florida.*"

The District Court of Kentucky held that all of the commerce from the two ports of Port Tampa and Jacksonville to interior Florida points was intrastate commerce and, therefore, intrastate rates should be charged. The Circuit Court of Appeals held that the shipments of fuel oil, gasoline and kerosene, which is denominated "fire proof oil" in the record, from Port Tampa to interior points were simply a continuation of the shipments from Mexican and Louisiana ports and were, therefore, foreign and interstate commerce, and that the rates approved by the Interstate Commerce Commission were applicable from Port Tampa

to the interior (R. 137-138); but as to lubricating oil rehandled at Tampa, it loses its status in the course of interstate transportation and takes on a predominant local character and that the rates established by the Florida Railroad Commission (that is, intrastate rates) are the ones properly applicable to lubricating oil shipments from Port Tampa to the interior and from Tampa to points beyond (R. 138-139). And as to the shipments through Jacksonville, gasoline, kerosene and lubricating oils should take the local or intrastate rates from Jacksonville to Florida points (R. 139). As to fuel oil from Jacksonville, the Court said:

> "The record is obscure and not sufficient for satisfactory determination. If substantially all of it goes forward to other points, pursuant to an established and known course of business, it is to be treated like the Port Tampa fuel oil; if according to the established methods and experience, a substantial part of it ends its journey at Jacksonville it is to be treated like the other oils at Jacksonville. The parties should produce further proofs on this point in the court below. We have no occasion now to deny that the fraction of fuel oil stopping at Jacksonville may be so small that it may be wholly disregarded in determining the through character of this commerce; nor is there necessity for attempting now to decide how small that fraction must be to be so disregarded. If that question arises upon the further proofs the court below will decide it" (R. 139-140).

The Supreme Court of Florida, in *Florida Railroad Commission v. Atlantic Coast Line Railroad Company* (this defendant) *and Seaboard Air Line Railway Com-*

pany, 109 So. 656, not yet officially reported, which was a case pending in Florida contemporaneously with the case at bar and involving the very same traffic involved in this case, has held that all of the traffic from Port Tampa and Jacksonville is intrastate commerce and has enjoined this defendant and the Seaboard Air Line Railway Company from charging other than intrastate rates. The decision of the Florida Supreme Court was August 10th, 1926. A stay bond was granted in that case and this Court granted to the defendants in that case, of which this defendant was one, a *certiorari* on March 21st, 1927, so that the whole question is now before this Court for determination. However, in the case decided by the Florida Supreme Court there was no testimony taken and the decision went off upon a question of pleadings.

ASSIGNMENT OF ERROR.

The Court erred in holding that the transportation of gasoline and refined and lubricating oils from Mexico and Louisiana and other points outside of Florida through Jacksonville to the interior points, is intrastate commerce; and in holding that the transportation of lubricating oil from Port Tampa and Tampa to interior points is intrastate commerce; the Court below having held that the transportation of gasoline, refined and fuel oil from Port Tampa to interior points was governed by interstate rates.

RATES TO BE CHARGED AS RESULT OF DECISION OF SIXTH CIRCUIT COURT OF APPEALS:

FROM PORT TAMPA

Commodity	*Rate*
Fuel Oil	Interstate
Gasoline	Interstate
Kerosene or Fire Proof Oil	Interstate
Lubricating Oil	Intrastate

FROM JACKSONVILLE

Commodity	*Rate*
Gasoline	Intrastate
Kerosene or Fire Proof Oil	Intrastate
Lubricating Oil	Intrastate
Fuel Oil	Undetermined

I

POINTS AND AUTHORITIES

THE APPLICATION OF THE RATES DEPENDS UPON THE ESSENTIAL CHARACTER OF THE COMMERCE AND NOT UPON ITS ACCIDENTS OR ISOLATED INCIDENTS. THE COMMERCE IS INTERSTATE AND FOREIGN AND, THEREFORE, ONLY INTERSTATE RATES CAN BE APPLIED.

A

THE ACTS OF PLAINTIFF, STANDARD OIL COMPANY, AND ITS CUSTOMERS, IN MAKING YEARLY CONTRACTS FOR PETROLEUM PRODUCTS TO BE DELIVERED AT INTERIOR POINTS IN FLORIDA, OF THEMSELVES, CONSTITUTE INTERSTATE COMMERCE.

Butler Bros. Shoe Co. v. United States Rubber Company, (C. C. A.) 156 Fed. 1,

International Text Book Co. v. Pigg, 217 U. S. 91, 107,
Flanagan v. Federal Coal Co., 267 U. S. 222,
Spalding & Bros. v. Edwards, 262 U. S. 66,
Lemke v. Farmers Grain Co., 258 U. S. 50,
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282,
Shafer v. Farmers Grain Co., 268 U. S. 189.

B

THE QUESTION OF WHERE TITLE PASSES DOES NOT DETERMINE THE RATE, AND IS OF NO MATERIALITY, BUT THE INTENTION OF THE PARTIES, AS SHOWN THROUGHOUT THEIR COURSE OF BUSINESS, GOVERNS.

Penn. R. R. v. Clark Bros. Coal Co., 258 U. S. 456,
Stafford v. Wallace, 258 U. S. 495,
T. & N. O. Ry. Co. v. Sabine Tram Co., 227 U. S. 112,
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498,
Swift & Co. v. United States, 196 U. S. 375,
B. & O. S. W. R. R. Co. v. Settle, 260 U. S. 166.

II

THE MOVEMENT OF LUBRICATING OIL FROM PORT TAMPA, AND OF LUBRICATING OIL, GASOLINE AND KEROSENE FROM JACKSONVILLE, ARE BOTH INTERSTATE COMMERCE AND THE REASONING OF THE CIRCUIT COURT OF APPEALS TO THE CONTRARY IS ERRONEOUS, BECAUSE IT MAKES THE CHARACTER OF THOSE MOVEMENTS TO THE INTERIOR DEPEND NOT UPON THEIR INTRINSIC NATURE BUT UPON THE AMOUNT OF THE SMALL PERCENTAGE SOLD LOCALLY.

Western Oil Refining Co. v. Lipscomb, 244 U. S. 346,
Railroad Commission v. Worthington, 225 U. S. 101,
Peoples Natural Gas Co. v. Public Service Commission of Pennsylvania, 270 U. S. 550,
Binderup v. Pathe Exchange, 263 U. S. 291,
Douglas v. Southern Ry. Co., 216 Ill. App. 148-151.

III

DECISIONS OF THE INTERSTATE COMMERCE COMMISSION

Tampa Fuel Co. v. Atlantic Coast Line R. R. Co., 43 I. C. C. 231,
International Agricultural Corp. v. Director General, 60 I. C. C. 726,
Alexander Grocery Co. v. Beaumont Sour Lake & Western Ry. Co., 104 I. C. C. 155.

IV

CASES RELIED UPON BY THE OIL COMPANY DISTINGUISHED

Railroad Commission v. Worthington, 225 U. S. 107,
Texas, etc. R. R. Co. v. Sabine Tram Co., 227 U. S. 112,
Binderup v. Pathe Exchange, 263 U. S. 291,
Stafford v. Wallace, 258 U. S. 525,
Hanley v. Kansas City Southern Ry., 187 U. S. 617,
Lemke v. Farmers Grain Co., 258 U. S. 50,
Texas Transport & Terminal Co. v. City of New Orleans, 264 U. S. 150,
Swift & Co. v. United States, 196 U. S. 375,
Addystone Pipe & Steel Co. v. United States, 175 U. S. 211,

Sonneborn v. Keeling, 262 U. S. 506,
Penn. R. R. v. Clark Bros., 238 U. S. 506,
Southern Pac. Co. v. Arizona, 249 U. S. 472,
Arkadelphia Milling Co. v. S. L. & S. W. Ry., 249 U. S. 134,
Penn. R. R. v. Knight ,192 U. S. 21,
Gulf, Colorado & S. F. Ry., v. Texas, 204 U. S. 403.

V

OIL CASES FROM NORTH CAROLINA AND FLORIDA

Atlantic Coast Line R. R. Co. v. Standard Oil Co., 12 Fed. (2d) 541,
State v. Seaboard Air Line Ry. and Atlantic Coast Line R. R. Co., 109 Sou. 656,
Hamilton Shoe Co. v. Wolff, 240 U. S. 258,
Hughes Bros. Timber Co. v. State of Minnesota, U. S. (Decided November 23rd, 1926, and not yet officially reported).

ARGUMENT.

I.

THE APPLICATION OF THE RATES DEPENDS UPON THE ESSENTIAL CHARACTER OF THE COMMERCE AND NOT UPON ITS ACCIDENTS OR ISOLATED INCIDENTS. THE COMMERCE IS INTERSTATE AND FOREIGN AND, THEREFORE, ONLY INTERSTATE RATE CAN BE APPLIED.

It must be borne in mind at the outset of this case that there are four different classes of commodities handled, to wit, gasoline, the bulk of which goes to the plaintiff's own stations; refined oil, which also goes to

its own stations; fuel oil, the majority of which goes to the phosphate mines in Bone Valley District and the other to industrial plants for fuel, and lubricating oil; and that the *plaintiff alleges* in its complaint that *gasoline, refined oil and fuel oil is handled and sold exactly the same way at Jacksonville as it is at Port Tampa,* except that some is shipped from Jacksonville to Georgia and Alabama points (R. 6 and 7). It was for *that reason,* therefore, that the testimony in this case deals largely with Port Tampa.

Port Tampa is on the West coast of Florida and Jacksonville is on the East coast of Florida, and the record shows, from the statement already made of the case, that either Port Tampa or Jacksonville is used by the plaintiff according to which port is to its best advantage to ship from. The products, except fuel oil, are not sold from Jacksonville or Port Tampa, but are sold from the bulk or service stations, fuel oil being sold on yearly contracts. None of them are sold at Port Tampa, and, apparently , only 13 per cent of gasoline and kerosene is sold at Jacksonville. They, therefore, all pass through Port Tampa and Jacksonville to other points in the interior of the state. As said by Mr. Violet, Vice-President, "*None of these oils that come into Port Tampa are sold there. It is my understanding that it is all destined to other points in Florida*" (R. 112). So, therefore, it is a known fact, as shown by this testimony, that when the oil starts from points of origin in Mexico or Louisiana its destination is not at these ports but is to interior points in Florida. The exhibits filed by the plaintiff and defendant and the charts and graphs which we have placed in this brief show a continuous uninterrupted flow of oil through these ports to the interior bulk stations and

to customers in other parts of Florida. It also shows that this has been the custom throughout the period testified to by the witnesses. The bill of complaint itself states that 95 per cent of the fuel oil involved is sold by the plaintiff to its customers in the interior of Florida on contracts made before the oil is ever received at Port Tampa or at Jacksonville, and that these contracts are made for a year, to be shipped in equal monthly quantities (R. 121). Likewise, the plaintiff makes a yearly contract with the Standard Oil Company of New Jersey for its supplies by the year, deliveries to be made in cargo lots in fairly even monthly quantities (R. 55). And in order to keep the oil flowing from its bulk stations to its customers at interior points in Florida, it has a contract with the Union Tank Car Company (Plaintiff's Exhibit No. 6, R. 114), by which the Tank Car Company leases to the plaintiff "*such tank cars of the Car Company as may be necessary for the transportation of the oil company's products.*" Under this contract the Oil Company agrees to pay demurrage charges "as provided for in the various railroad tariffs filed with the Interstate Commerce Commission" (R. 118). In the contract which it makes with the Standard Oil Company of New Jersey it agrees to furnish it a safe berth for its steamers to discharge at Port Tampa, Key West or Jacksonville, and according to the witness Morris, it pays to this defendant *wharfage governed by the regular tariff rates filed with the Interstate Commerce Commission* (R. 130). In its contract that it makes for the sale of fuel oil it provides that the oil must be used exclusively by the buyer and not be resold and that the *buyer shall order and receive a monthly proportion of the entire contract* (R. 121). Payment is

to be made by the buyer monthly for the oil delivered. *Buyer shall pay any import tax, if one shall hereafter be imposed on oil by the Mexican Government, over and above 19 cents per barrel; such increase shall be paid by buyer on all deliveries under this contract,* and should there be a decline the buyer shall receive the benefit thereof (Section 5 of Contract, R. 122). This, taken in connection with the allegation of the complaint that 95 per cent of this fuel oil is sold to purchasers on contracts made before the oil comes into Port Tampa and Jacksonville on contracts for a year, clearly indicates the *intention of the plaintiff* in this case of *selling oil* purchased from Mexico *to interior points in Florida and shipping it through monthly.*

A.

THE ACTS OF PLAINTIFF, STANDARD OIL COMPANY, AND THEIR CUSTOMERS IN MAKING YEARLY CONTRACTS FOR PETROLEUM PRODUCTS TO BE DELIVERED AT INTERIOR POINTS IN FLORIDA, OF THEMSELVES, CONSTITUTE INTERSTATE COMMERCE.

The *acts of the oil companies and of their customers* at interior points in Florida *in making contracts for yearly* supplies to be obtained from Mexico, or other points outside of Florida, in and of themselves *constitute foreign and interstate commerce*, for all of the parties must have known at the time of the making of the contracts that the oil must necessarily move in foreign and interstate commerce in order that delivery may be effected at such interior points in Florida.

Flanagan v. Federal Coal Co., 267 U. S. 222.
Spalding & Bros. v. Edwards, 262 U. S. 66.
Lemke v. Farmers Grain Co., 258 U. S. 50.
Dahnke Walker Milling Co. v. Bondurant, 257 U. S. 282.
Shafer v. Farmers Grain Co., 268 U. S. 189.
Butler Bros. Shoe Co. v. U. S. Rubber Co. (*C. C. A.*), 156 Fed. 1.
International Text Book Co. v. Pigg, 217 U. S. 91, 107.

In *Butler Bros. Shoe Co. v. United States Rubber Co., supra*, the Eighth Circuit Court of Appeals in an opinion by Circuit Judge Sanborn, with whom sat Circuit Judge Van Deventer and District Judge Phillips, in discussing whether contracts in the suit were transactions of interstate commerce, laid down the following definition of what acts are included in interstate commerce:

> "A sale is not the test of interstate commerce. All sales of sound articles of commerce, which necessitate the transportation of the goods sold from one state to another are interstate commerce; but all interstate commerce is not sales of goods. Importation into one state from another is the indispensible element, the test, of interstate commerce; *and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce.* 'Since the case of Gibbons v. Ogden, 9 Wheat,' said Chief Justice Waite in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 8, 'it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress.' "

This definition was approved by this Court in *International Text Book Company v. Pigg*, 217 U. S. 91, 107, where the Court, speaking through Mr. Justice Harlan, said:

> "If intercourse between persons in different States by means of telegraphic messages conveying intelligence or information is commerce among the States, which no State may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States within the meaning of the Constitution, especially where, as here, such intercourse and communication really relates to matters of *regular, continuous business and to the making of contracts and the transportation of books, papers, etc.*, appertaining to such business."

This definition includes in the case at bar, the making of yearly contracts by the oil company for fuel oil to be brought from Mexico to Florida ports and delivered to the phosphate mines and other interior Florida points; it includes the system of reports used by the oil company to ascertain the supply of petroleum products on hand, and it includes the means, whether mail, telegraph or telephone, whereby this intelligence is conveyed; the orders or requests from the phosphate mines, the managers of its bulk stations and its other customers for tank car movements from the ports to the interior destinations; the requests of its agents and servants for the movement of tank cars; the making of contracts for the tank cars; the loading of the tank cars at ports, and the unloading at interior points; the billing of the cars for delivery at the interior destinations, all of which acts are parts and parcels of a

regular and continuous course and current of commerce in the sale and movement of the oil from Mexican and Louisiana points to interior points in Florida.

In *Dahnke-Walker Milling Company v. Bondurant, supra,* a milling company in Tennessee bought a crop of wheat from a Kentucky farmer. The transaction of purchase was entirely in Kentucky, the wheat was to be delivered in Kentucky and the money to be paid in Kentucky. Wheat went up in price and Bondurant refused to deliver. The milling company sued him on the contract and he pleaded that the milling company, a corporation, had failed to file with the Secretary of State of Kentucky a statement giving the name of an agent upon whom process could be served and, therefore, the contract was not enforceable under the statute of Kentucky. The Court of Appeals of Kentucky held with the defendant but this Court reversed the judgment. In the opinion of the Court Mr. Justice Van Deventer (page 290) said:

> "The commerce clause of the Constitution, Article 1, Section 8, Clause 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. *Where goods in one state are transported into another for purpose of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach* their destination, and while they are in the original packages. * * * On the same principle, where goods are purchased in one state for transportation to another, *the commerce includes the purchase quite as much as it does the*

transportation. * * * This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton v. Missouri*, 91 U. S. 275-280: 'Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities.' In *Kidd v. Pearson*, 128 U. S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' "

On page 292 the Court said:

"It has been the practice of the plaintiff to go into Kentucky to purchase grain to be transported to and used in its mill in Tennessee. On different occasions it had purchased from the defendant,—at one time 13,000 bushels of corn. This contract was made in continuance of that practice, the plaintiff intending to forward the grain to its mill as soon as the delivery was made. In keeping with that purpose the delivery was to be on board the cars of a public carrier. Applying to these facts the principles before stated, we think the transaction was in interstate commerce."

Further, on the same page the Court said:

"The state court also attached some importance to the fact that *after* the grain was delivered on the cars, *the plaintiff might have changed its mind* and have sold the grain at the place of delivery, or have shipped it to another point in Kentucky. *No doubt this was possible, but it also was improbable.* With equal basis it could be said that a shipment of merchandise billed to a point beyond the state of its origin might be halted by the shipper in the exercise of the right of stoppage in transitu before it got out of that state. *The essential character of the transaction as otherwise fixed is not*

changed by a mere possibility of that sort. * * * For these reasons we are of opinion that the transaction was a part of interstate commerce."

In the *Spalding case, supra,* Delgado & Compania, a firm in the City of La Guaira, Venezuela, ordered Scholtz & Company, a commission merchant in New York, to buy for their account a certain number of baseballs and baseball bats, etc., at an agreed price, and to mark the packages in a particular way to indicate the purchasers and their place. Scholtz & Company then sent to Spalding & Company a paper writing dated December 10th, 1918, as follows: "Export order from Scholtz & Company, shipping and commission merchants. Please ship on or before the —— steamer ———. Rush. * * * Please send memorandum invoice at once, so we can apply for license and clear at custom-house." Scholtz & Company instructed Spalding & Company to deliver the package to the A. & C. Navigation Company, an exporting carrier in New York. Spalding & Bros. marked and delivered the goods as directed and were given a receipt by the carrier, which it sent to Scholtz & Company, and which was exchanged by the latter for an export bill of lading in their name dated February 10th, 1919. The goods were transported and delivered in due time to Delgado & Compania. Scholtz & Company paid Spalding & Bros. on February 1st and were paid their commission by Delgado & Compania in ninety days from date of shipment. The Court says (page 68):

"The *transaction,* from start to finish, *was understood and intended* by the plaintiff and Scholtz & Company *to be for the purpose of exporting the goods to Delgado & Compania in Venezuela.* The question is whether the sale was a step in expor-

tation, assuming, as appears to be the fact, that the title passed at the moment when the goods were delivered into the carrier's hands. * * * Articles in course of transportation cannot be taxed. * * * So we return to the question we have stated. To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. * * * In this case, for instance, while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants. * * * On the other hand, no one would doubt that they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun."

The Court further says (page 70):

"*Neither does it matter that the title was in Scholtz & Company, and that, theoretically, they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur.* The purchase by Scholtz & Company was solely for the purpose of Delgado & Compania, and for their account and risk. Theoretical possibilities may be left out of account."

And the Court held that goods were subject to the export tax.

The case of *Lemke v. Farmers Grain Company, supra,* is valuable on account of its application to plaintiff's claim in this case, that it acted as a jobber of oil. There, the Farmers Grain Company, a corporation of North Dakota, was engaged in the business of buying corn from farmers of North Dakota, which it

stored in its elevator and which it subsequently sold to persons in other states. That it was an unusual thing to get an offer from a point within the state. That is just what plaintiff claims it was doing here, buying up oil and selling it out to customers as a jobber. The statute of North Dakota required a license to be obtained by purchasers of grain. The Farmers Grain Company resisted the payment of this license on the ground that it was engaged in interstate commerce and could not be required to pay this license tax. The Court said (page 54):

> "That such course of dealing constitutes interstate commerce there can be no question."

Again, the Court said (page 55):

> "It is true, as appellants contend, that after the wheat was delivered at complainant's elevator or loaded on the cars for shipment it might have been diverted to a local market or sent to a local mill. But such was not the course of business. *The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sold in the Minneapolis market. That was the course of business and fixed and determined the interstate character of the transaction.*"

In the *Flanagan case, supra,* a contract was made August 19th, 1920, which bound plaintiff to deliver, and defendant to accept, approximately 200 cars of Tracy City run of mine coal at $9.00 per ton f.o.b. cars at Tracy City, Tenn., shipments to be approximately 50 cars per month from September 1st to December 31st, payments to be made weekly. The Federal Coal Company *bought to sell again, exactly the same as the plaintiff in this case alleges it does.* It did not receive

the coal itself but gave orders to Flanagan, who took bills of lading from the railroad at Tracy City in the name of the Federal Coal Company *and consigned the coal to that company's customers in other states, as directed.* The company did not usually sell in Tennessee. It broke off this contract because the price of coal went down, and, as it said, its customers refused to keep their bargains in turn. The Court says (page 225):

> "It was understood between the parties that these dealings were steps in sending coal from the mines to purchasers in other states. Very likely the Federal Coal Company might have stopped the coal at Tracy City in Tennessee, but it had no thought of doing so, and Flanagan understood the course of business in which he was expected to co-operate and did co-operate. Therefore, in this matter the parties were engaged in interstate commerce, and the state law even if valid as a tax could not invalidate their contract."

It seems to us that there is no distinction between the case at bar and these cases. It is clearly shown by the testimony that the custom and the course of business thoroughly understood by and between all parties is that petroleum products from Mexican and Louisiana points are bought at those points for delivery, not at Port Tampa or at Jacksonville, but for delivery, in the case of fuel oil, to its customers who have made contracts by the year, and as to the other products, to its bulk and service stations at interior points in Florida and its customers at those points; and that the storage tanks at Port Tampa and Jacksonville are only a temporary reservoir for the transportation through by tank cars to these interior points. In this

connection we must bear in mind that Mr. Violet, Vice-President, testified that more than 90 per cent of this gasoline received at these ports goes to the plaintiff's own bulk stations (R. 111). And the bill of complaint alleges (Paragraph 4, Subsection (d), R. 5), "All of said fuel oil is sold by the complainant within the boundaries of the State of Florida. Approximately 95 per cent of said fuel is sold to customers in Florida *on contracts made before the fuel oil comes to us at Port Tampa. Practically all contracts made by the complainant with its customers for the sale of fuel oil are made for one year.*"

Mr. Zachary testified in regard to these tanks (R. 123): "It is necessary for us to have a large storage in handling fuel oil. Our customers require it and I had some of them, *when I was trying to negotiate contracts*, ask how much storage facilities we had at our point of supply. They have to know if there is an adequate storage." Here, the intention of the parties is clearly, and without contradiction, shown to be for a through movement to interior points and sales made there, for the testimony is uncontradicted that the sales are either made on contracts for the year before the products arrive at the ports or from the bulk and service stations.

B.

THE QUESTION OF WHERE TITLE PASSES DOES NOT DETERMINE THE RATE, AND IS OF NO MATERIALITY, BUT THE INTENTION OF THE PARTIES, AS SHOWN THROUGHOUT THEIR COURSE OF BUSINESS, GOVERNS.

This was decided in *Penn. R. R. Co. v. Clark Bros. Coal Co.*, 238 U. S. 456; *Stafford v. Wallace*, 258 U. S.

495; *T. & N. O. R. R. Co. v. Sabine Tram Co,* 227 U. S. 112, and in other cases heretofore cited.

The case of *Texas, etc., R. R. Co. v. Sabine Tram Company, supra,* is decisive, in our opinion, of this case and shows that the traffic here involved from beginning to end is foreign and interstate commerce. The only difference being that in the *Sabine Tram Case* it was the first part of the journey that was in controversy, while in this case it is the last part of the transportation. In the *Sabine Tram* case the question was whether or not the *gathering in of lumber from points in Texas to Sabine, Texas,* from which it was shipped to foreign countries was intrastate or foreign commerce, it being conceded that the shipments from the concentration point on the coast to foreign ports was foreign commerce. Here, it is conceded that the transportation from a foreign port to Port Tampa and Jacksonville is foreign commerce and the point in controversy is as to whether the *further shipment by rail from these ports* to the interior points in Florida, where the product is sold and delivered, is a continuation of this foreign commerce or is intrastate commerce. Or, to put it another way, whether, as the plaintiff claims, the shipments come to rest at those ports and take on another character. Or, put as our late associate, Mr. Helm Bruce, put it in the brief in this case before the Circuit Court of Appeals for the Sixth Circuit:

> "But the crucial question in the Tram case, exactly as in the case at bar, was whether this transportation was, for the purpose of determining its character, to be considered as *one movement* from the point of origin to the ultimate destination, or, on the other hand was to be considered as two

independent movements, one from the point of origin to an intermediate point and the other from this intermediate point to the ultimate destination."

It is well to state the facts in the *Sabine Tram case*, because we believe that that case is decisive of the case at bar. There, Powell & Company were engaged in buying lumber for export to different European points, the exportation being made through the ports of Sabine and Port Arthur, in Texas. Powell had made sales of lumber to customers for future delivery in Europe and chartered ships to carry this lumber from the Texas port to its European destination. To cover their contracts for sale Powell & Company bought large quantities of lumber from the Sabine Tram Company, whose mills were at Ruliff, Texas. The Sabine Tram Company sold this lumber to Powell & Company f. o. b. cars Sabine, Texas, and bills of lading were executed by the railroad company for delivery at Sabine. Upon its arrival at the railroad station at Sabine the lumber *was taken possession* of by Powell & Company and carried by it beyond the station about a quarter of a mile to the dock where it was to be loaded. On this dock it was loaded within reach of ships' tackle. The Sabine Tram Company had no connection with this further carriage or switching of the lumber to the dock after its arrival at the station of Sabine, but this was done solely at the instance and under the direction of the agent of Powell & Company (page 115). Powell paid the freight to the railroad but this was only for the convenience of the Tram Company, which was obligated to pay the freight as between it and Powell, and this was charged to the Tram Company. Bills of lading for the lumber were issued calling for delivery at

Sabine. It was transported and delivered there where the purchase price was paid by Powell, to whom it was delivered and where, of course, title passed. At page 118 the Court says:

> "At the time this lumber was shipped it was destined by Powell Company for export to some foreign port, BUT THE PARTICULAR DESTINATION OF ANY PARTICULAR PORTION OF THE LUMBER WAS NOT FIXED, although the destination of all of the lumber to certain foreign ports was known and fixed. The Sabine Tram Company had no concern with the destination of the lumber after it came into the hands of Powell Company, and had no particular knowledge thereof. It supposed from the fact that it was known that Powell Company were exporters of lumber, from the character of lumber which was such as was intended for export, from the fact that Sabine was an important place (unimportant?) at which very little lumber was used, and from other facts and circumstances, known to millmen generally, that the lumber was intended for export, but gave that matter no concern, being only concerned with the delivery of the lumber to Powell Company at Sabine station, and paying the freight thereon. What was done by the Texas & New Orleans Railroad Company after the arrival of the lumber at Sabine, in the way of switching to the docks, allowance of certain privileges allowed only to export freight WAS DONE AT THE INSTANCE AND FOR THE BENEFIT OF POWELL COMPANY, WITH WHICH THE TRAM COMPANY HAD NO CONCERN."

Again the Court said:

> "The lumber remained, after arrival, in the slips or on the dock *from one to thirty days* until a ship chartered by Powell & Company arrived,

when that company selected out the lumber for that cargo, and shipped it forward to the destination for which Powell & Company intended it." (Page 119.)

And in conclusion of its statement of facts, the Court said:

> "*There is not now and was not at the time these shipments moved, any local market for lumber at Sabine,* the population of which place does not exceed fifty in number. *Appellees have never done any local business at that point.* For the year 1905 there was exported through the port of Sabine 14,667,670 feet of lumber; for the year 1906 39,554,000 feet. *The shipments in controversy, together with other shipments of lumber to Sabine and Sabine Pass, constitute a large and constantly recurring course of foreign commerce passing out through the port of Sabine.*" (Page 120.)

The facts in these two cases are similar. Here the particular destination of any particular barrel or gallon of oil is not fixed, although it is known that all of these products are going through to interior points in Florida. It is known, for instance, that at Port Tampa no such petroleum products are used or sold, that place being like Sabine, a small place for ships to dock for export and import. In the Sabine case the particular destination of any particular portion of the lumber was not fixed although the destination of all of the lumber to certain foreign ports was known and fixed. Sabine was a small export port similar to Port Tampa. Here the plaintiff claims that the storage tanks are large enough to hold oil for an average of sixty days or more. There the lumber remained on the dock for from one to thirty days until a ship chartered

by Powell & Company arrived. *There the company selected out the lumber for that CARGO and shipped it to the destination for which Powell & Company intended it.* Here plaintiff alleges that title to the oil changes at Port Tampa and it receives its title only at that point. There, in the Tram case, title passed to Powell & Company f. o. b. cars at Sabine Pass. In each case the seller while he probably had no definite information as to the exact point to which the commodity was going, nevertheless knew that it was not to stop at the intermediate point.

But, there is another striking similarity between the facts in the two cases. In the *Tram Case* the Court found:

> "That the shipments in controversy, together with other shipments of lumber to Sabine and Sabine Pass, constituted a large and constantly recurring course of foreign commerce passing out of the port of Sabine."

Here the facts show a large and constantly recurring course and custom carried on daily, monthly and yearly of petroleum products coming into Port Tampa and Jacksonville, destined, not for consumption at those ports, except a comparatively small portion consumed locally at Jacksonville, but for *sale and delivery,* some upon yearly contracts previously made, and others to supply the plaintiff's own demands in its enormous business transacted at bulk and service stations at interior points in Florida, where its products, except those previously sold under contract, are sold and delivered. The opinion of the Court was written by Mr. Justice McKenna, who says:

"If we may regard the essential character of the shipments, we can have no hesitation in pronouncing them to have been in interstate commerce. This conclusion seems to be determined by the last finding of fact. It is there declared that 'the shipments in controversy, together with other shipments of lumber to Sabine and Sabine Pass, constitute a large and constantly recurring course of foreign commerce passing out through the port of Sabine.'

"If the shipments were foreign commerce it is hardly necessary to make explicit the principle that the national dominion over them was supreme; and, conversely, if the shipments were not of that character, they were subject to the regulating power of the state."

"*Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 122."

And again:

"It is said, however, that the Sabine Company had no connection with the lumber after its arrival at Sabine, and had no concern with its destination after it came into the hands of Powell & Company, and had no particular knowledge thereof. Like circumstances undoubtedly existed in Southern P. Terminal Co. v. Interstate Commerce Commission. It did not prevail there and cannot prevail here. The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, nor its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured, and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle, and means will be afforded of evading the national control of foreign commerce

from points in the interior of a state. There must be a transshipment at the seaboard; and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign." (227 U. S. 126.)

The Court continued:

"And the shipment was not an isolated one, but typical of many others, which constituted a commerce amounting in the year 1905 to 14,667,670 feet of lumber, and in the year 1906, 39,554,000 feet. Nor was there a break, in the sense of the interstate commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transshipment at Sabine. Swift & Co. v. United States, 196 U. S. 375; 49 L. Ed. 518; 25 Sup. Ct. Rep. 276. Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments." (Page 130.)

The same views are expressed by this Court in the case of *Southern Pacific Terminal Company v. Interstate Commerce Commission,* 219 U. S. 498. The questions there raised were with respect to the rates on shipments of cotton seed cake and meal, which were purchased by one Young at various points in Texas and shipped to him at Galveston, but ultimately shipped by him to foreign points. Young, who was the owner of the traffic, had leased the pier belonging to the Terminal Company at Galveston and the cake was concentrated upon this pier and manufactured into meal and sacked. About one-half of the cake was ground up on the wharf and reshipped as meal and the balance was shipped to foreign ports as cake. *The traffic was thus actually taken into possession by the owner,*

concentrated, accumulated and treated on his privately leased warehouse space and subsequently loaded into vessels for export. By reason of his lease Young was able to avoid the payment of railroad storage and handling charges and could manufacture his cotton seed meal on the wharf, thereby obtaining an advantage over his competitors. The validity of this lease was attacked as an undue preference given to Young, and the railroad defended upon the ground that the movement to Galveston was purely an intrastate one and hence without the jurisdiction of the Interstate Commerce Commission, but this Court overruled this contention and held that the traffic was essentially interstate or foreign throughout. Here it will be seen that the cotton seed cake changed its form by manufacture and became another product, to wit, cotton seed meal, and here it was contended that the transit of the cake and meal absolutely ended on the leased premises at Galveston and that Galveston was a final point of concentration and manufacture. The report of this case does not show how long the cotton seed meal and cake remained in the possession of Young at Galveston after being delivered to him and before being ground up and shipped, but there was a delay in the shipment from the port, just as in this case there is some delay at times in the shipments of gasoline from the Florida ports, but no delay in the shipment of lubricating oil, which is pumped direct from vessel into tank cars and immediately transported by rail. The Court held that the shipments from points in Texas to Galveston were but incidents in the transshipment of the product in export trade and, therefore, their regulation was within the power of the Interstate Commission. The Court said:

"The cake and meal purchased by Young are bought by him in Texas, Oklahoma, Louisiana and Arkansas, but chiefly in Texas, and shipped to him on bills of lading and waybills, showing the point or origin in those states and the destination at Galveston. *The purchases are made for export, there being no consumption of the products at Galveston. His sales to foreign countries are sometimes for immediate and sometimes for future delivery, irrespective of whether he has the product on hand at Galveston. At times he has it on hand. At times, therefore, orders must be filled from cake to be purchased in the interior or then in transit to him.* When the cake reaches Galveston it is ground into meal and sacked by Young, and for the meal thus ground and such meal as has been brought to his customers he takes out ships' bills of lading made to his order."

And the Court continued:

"In other words, the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade, and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things, and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading, or whether their initial point was Galveston or some other place in Texas."

If the Court will turn to the charts and graphs which we have attached to the brief, the graphs will show a large and constantly recurring course of foreign and

interstate commerce passing through the ports of Port Tampa and Jacksonville to interior points in Florida. While the shipments into the ports vary, yet the shipments *out* of the ports, as seen on the charts and graphs, show a steady flow, not from, but through these ports, to such interior points.

As showing that this oil is continually flowing in a constant stream through to interior points, see the testimony of Mr. Morris on cross-examination (R. 129):

> "The Standard Oil Company has in some months only two steamers coming in and some months four, and I suppose they might have five but probably not more than five. At the time oil and gasoline are being pumped from the boat into a tank and from the tank into tank cars *simultaneously* is possibly *one-third of the time*. Some of the ships take three days and some others can be pumped out in one day. If they have two a month and it took a day to pump each one would be two days. *There is no stoppage of shipping out of the tank into tank cars on account of pumping in. 'They are pumping in and shipping out at the same time whenever a boat happens to be there and they happen to be loading tank cars.*"

Thus, there is a constant stream flowing through these ports and these ports are used only incidentally as a funnel through which the products may flow to plaintiff's contract customers and its bulk and service stations.

Such a stream or flow is well emphasized by the present Chief Justice in Stafford v. Wallace, 258 U. S. 495, in an illuminating opinion. The opinion covered two suits heard together, both of them involving transactions in live stock at the stock yards in Chicago. One

of them was by commission men at the Union Stock Yards and the other by "dealers" in the same yards. They both attacked the constitutionality of the "Federal Packers and Stock Yards Act of 1921, approved August 15, 1921", which provides for the supervision by Federal authority of the business of the commission men and of the live stock dealers in the great stock yards of the country. It seems that the live stock came from the farmers of the West, who had raised it, consigned to commission men at the stock yards, who sold it as commission men to "dealers", who in turn sold the same again "to farmers and stock feeders, to be taken to the country for farm use and fattening", and also to packers. "It was conceded that of all the live stock coming into the Chicago Stock Yards and going out, only a small percentage, less than 10%, is shipped from or to Illinois" (page 502). It was the contention of the plaintiffs "that with the delivery to the commission merchant, the transportation is completely ended, that all the live stock consigned to commission merchants are sold by them for a commission or brokerage, and not on their own account; that they are sold at the stock yards and nowhere else" (page 498). As to the dealers, it was claimed "that the dealers buy in open market in competition with each other; that they pay the expense of the custody, care, feeding and watering of the stock while they hold them; that they sell promptly, and have nothing to do with the shipment of the live stock they sell from the yards to points outside" (page 499).

These so-called "dealers" occupied very much the position which plaintiff insists that it occupies when it speaks of itself as occupying the position of a "jobber", to wit, one who buys in large quantities and

then resells. That is just what these dealers did. Upon the foregoing facts it was insisted that the transactions of the commission men and the dealers at Chicago constituted no part of interstate commerce; but on that subject the Supreme Court, in an opinion by Chief Justice Taft, said:

> "The stock yards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. *The stock yards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another.* Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. *The commission men are essential* in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. *The dealers are essential* to the sales to the stock farmers and feeders. *The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current,* not interfering with, but, on the contrary, *being indispensable to its continuity.* The origin of the live stock is in the West, its ultimate destination known to and intended by, all engaged in the business in the Middle West and East either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. *The stock yards and the sales are necessary factors in the middle of this current of commerce.*" (pages 515, 516.)

This seems to us to be a very clear and strong statement, and one which describes the character of the commerce in the oil which we are considering. Its *origin* is in Mexico and Louisiana; its *ultimate destination* is known to, and intended by, all engaged in the business to be the interior of Florida. The change from *water* trasportation to *rail* transportation, and the use of the tanks as a medium of exchange are but necessary factors in the middle of this current of commerce.

In the course of its opinion in *Stafford v. Wallace*, the Court quotes with approval the following language from *Swift & Company v. United States*, 196 U. S. 375, the principles of which this Court says have become a fixed rule of this Court in the construction and application of the commerce:

> "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the *purchase* of the cattle is a *part and incident* of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle" (258 U. S. 518). *Swift & Co. v. United States*, 196 U. S. 375.

The reasoning and decision of this Court in the case of *B. & O. S. W. R. Co. v. Settle*, 260 U. S. 166, is identical with that in the case of *Stafford v. Wallace*. The former case was twice before the Circuit Court of Ap-

peals for the Sixth Circuit, from which this appeal is pending, before coming to this Court. (*B. & O. S. W. R. Co. v. Settle,* 249 Fed. 913, and 272 Fed. 675.)

The facts in this case were as follows: Settle & Company seem to have been contractors engaged in business in which they used large amounts of lumber. They had "jobs" at different places in Ohio, including Oakley, Hyde Park, Pleasant Ridge and Madisonville. They bought their lumber at different points in the South. Oakley and Madisonville were both within the city limits of Cincinnati. There were published interstate carload rates from southern points to Madisonville. There was also a published local intrastate carload rate on lumber from Oakley to Madisonville. The interstate rate from the southern points to Madisonville was greater than the sum of the interstate rates from southern points to Oakley, plus the intrastate rate from Oakley to Madisonville. Settle & Company had certain carloads of lumber shipped from Southern points consigned to themselves at Oakley. When these cars reached Oakley, Settle & Company accepted the lumber. Delivery was there made to them by placing the cars on team tracks. And thereafter they shipped these cars containing this lumber from Oakley to Madisonville, for which shipments new bills of lading—local bills—were issued, and the lumber was carried on to Madisonville. The following statement of fact was made by the Circuit Court of Appeals in its opinion in 272 Federal:

> "It further appeared upon the trial that defendants had no place of business at Oakley; but there was testimony that Oakley was their unloading and distributing point for lumber to be used at Oakley, Hyde Park, or Pleasant Ridge, where de-

> fendants had jobs; *that defendants could not tell, until the cars reached Oakley, whether they would have demand for the lumber there,* but that the cars that ultimately went to Madisonville (the cars in question here) were intended from the beginning to go to Madisonville; that they were shipped to Oakley, and reshipped from that place to Madisonville, for the purpose of getting the lower freight rate." (Page 677.)

Under this state of facts the Circuit Court of Appeals was of the opinion, for which the reasons are given mainly in the Court's first opinion in *249 Federal,* that:

> "The character of the shipment from Oakley to Madisonville is to be ultimately tested by the consideration whether or not there was an actual good faith delivery of the shipments to the consignee at Oakley, and actually a new and independent shipment therefrom by defendants to Madisonville while the lumber was physically present in their possession, and that the effect of such good faith delivery, possession and independent reshipment is not, as a mere matter of law, converted into an interstate shipment by the existence of an original and continuing intention to so reship in intrastate commerce for the saving of expense. 249 Fed. 913, 918, 162 C. C. A. 111, 116." (272 Fed., page 677.)

In other words, the Circuit Court of Appeals thought that if the shipper did actually have the goods consigned to himself at Oakley, and did actually there receive delivery and have physical possession of the goods at Oakley, and he did thereafter ship the goods by a new contract under a new bill of lading by another separate movement from Oakley to Madisonville, this was something he had the right to do, and the two

movements were in fact independent of each other. The Court thought the mere fact that shipper knew when the lumber started from the southern points that he was going ultimately to take it to Madisonville, and that such was his intention, did not change the legal nature of the shipments. This seemed to the Court to be exactly what this Court had held in the case of *Gulf, etc., Ry. Co. v. Texas,* 204 U. S. 403, 413, under exactly similar facts, where exactly the same thing was done for exactly the same purpose.

But this Court reversed the judgment of the Circuit Court of Appeals and *took exactly the opposite view upon the ultimate determining question in the case.* Whereas the Circuit Court of Appeals, as expressed in the language above quoted, thought that the character of the shipment was to be ultimately tested by the consideration of whether or not there was an actual good faith delivery at Oakley, and that if so, the character of the shipment was not affected by the fact that the shipper had an original intention to reship from Oakley to Madisonville, this Court thought that this original intention was the determining factor in the case, fixing the nature of the shipment "as a matter of law." Stating the question to be determined, this Court said:

> "The question is presented whether in view of the undisputed facts the original and continuing intention so to reship made the reshipment, as matter of law, part of the through interstate movement." (160 U. S. 168.)

In answering that question the Court said:

> "No material fact, evidential or ultimate, had been left in dispute. *There was no room for any*

issue of good faith to be determined by the jury. Physical delivery of the cars to the shippers had been made at Oakley, after payment of the freight and other charges. The shippers had no place of business at Oakley. The delivery there was the completion of one stage in the contemplated movement to Madisonville. After a brief interval the second stage was begun under the local bill of lading" (page 169).

And again the Court said:

"Madisonville was at all times the destination of the cars; Oakley was to be merely an intermediate stopping place, and the original intention persisted in was carried out. That the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, the *intention* as it was carried out *determined, as matter of law, the essential nature of the movement;* and hence that the movement through to Madisonville was an interstate shipment. *For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment.* These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic" (page 171).

This statement by the Court is directly applicable to the facts in the case at bar. There is no dispute in the present case as to the intention of the Standard Oil Company of Kentucky when it bought this oil from the Standard Oil Company of New Jersey in Mexico,

or from the Standard Oil Company of Louisiana at Baton Rouge, Louisiana, and ordered the same shipped to Port Tampa. Of course, there was, to use the language of this Court in the *Settle case*, "a possibility" that the oil might be used at Port Tampa, *but there was no expectation or intention of such a result*. Everybody knew that the oil was going *on through Port Tampa* to the Standard Oil Company's customers in the interior of the State. This was known in the present case just as certainly and as definitely as it was known in the *Settle case* that the lumber was going on through Oakley to Madisonville. And, as said by this Court in *Spalding Bros. v. Edwards* "Theoretical possibilities may be left out of account" (262 U. S. 66, 70).

It is true in the present case that it was not known as to any particular shipment or gallon of oil whether its ultimate destination was to be one particular point or another in the interior of Florida. And this was wholly unimportant, because all of the oil of each class was exactly alike.

As said by the Court below:

> "The identity of the oil which goes into the tank with that which goes out is not lost. The oil is fungible, each gallon is equal to any other gallon. If 100 barrels were billed from Tampico to the user at an interior point, no one would think that a holding of it on the way in this storage tank for a reasonable time until the user was ready for it, would affect its character as a through shipment. To this view it does not seem material that the users, instead of one concern, are a known and small group, among whom it is from the beginning intended that the shipment should be distributed" (R. 136).

II.

THE MOVEMENT OF LUBRICATING OIL FROM PORT TAMPA, AND THE MOVEMENT OF LUBRICATING OIL, GASOLINE AND KEROSENE FROM JACKSONVILLE, BOTH CONSTITUTE INTERSTATE COMMERCE, AND THE REASONING OF THE CIRCUIT COURT OF APPEALS TO THE CONTRARY IS ERRONEOUS, BECAUSE IT MAKES THE CHARACTER OF THOSE MOVEMENTS TO THE INTERIOR DEPEND, NOT UPON THEIR INTRINSIC NATURE, BUT UPON THE AMOUNT OF THE SMALL PERCENTAGE SOLD LOCALLY.

It is definitely and positively known here that all of the petroleum products from Mexico and Louisiana are going through Port Tampa and Jacksonville to some other points in the interior of the State where the Standard Oil Company's customers with whom it has contracts are located, or to its bulk and service stations from which it sells and delivers it, except a small percentage of gasoline and kerosene, which is only 13 per cent, which goes through Jacksonville.

The Court below, on page 139, says:

> "As to gasoline and kerosene, the proof is that 13 per cent of the amount received into the tanks is used locally at Jacksonville and never gets any further shipment. 13 per cent is a very substantial fraction; it cannot be regarded as negligible. It follows that as to any particular unit of oil coming into the tanks, it cannot be said that there was always an intent for further transportation and for merely temporary stoppage. The one causing the original shipment knew, and therefore intended, that this particular gallon or barrel, or 100

> barrels, might stop at Jacksonville or might go on. This uncertainty is inconsistent with that clear intent which, and which only, can carry the original character along into the second stage of the interrupted shipment."

And, therefore, because of this 13 per cent, which is used locally at Jacksonville, the Court concluded that intrastate rates should apply on *all gasoline and kerosene* shipped out of Jacksonville. The error which the Court below falls into in its conclusion is that there is no question in dispute between these parties as to the rate on the petroleum products which *stop* at Jacksonville. There is no rate *charged* on them as *they are delivered in tank wagons and sold locally,* but the products which go to the interior points, for instance, fuel oil, which is contracted for by the year, and gasoline and kerosene, which is shipped to plaintiff's own bulk and service stations and there sold and delivered, was *intended at all times,* and *prior* to the *importation* into Jacksonville, to be shipped to these interior points and *there* sold. This was a constantly recurring course of business, custom and practice of the Oil Company and of its customers, known by every one connected with the business.

Mr. Morris testifies (R. 128) that he is quite familiar with the methods of oil companies at Port Tampa, and in a general way knows what is done at Tampa. The Standard Oil Company (this plaintiff), the Gulf Refining Company, Seaboard Oil Company and the National Petroleum Corporation, are all located at Port Tampa, and the Mexican Petroleum Company and the Texas Oil Company have yards at Tampa. The Gulf Refining Company brings its products into Port Tampa in tank ships owned by the Gulf Refining Company and the products of the other oil companies are distri-

buted in absolutely the same way as the Standard Oil Company of Kentucky distributes.

If the reasoning of the Circuit Court of Appeals above should be upheld this defendant would be in an anomalous situation and, unable intelligently to apply the proper class of rates to the kerosene and gasoline shipped out of Port Tampa or Jacksonville by the various oil companies, unless it could ascertain in advance what percentage of receipts of each oil company was sold locally or barrelled, and whether the oil was shipped in the company's own vessels or in chartered vessels. The record shows that this plaintiff sells no gasoline or kerosene at Port Tampa, but at Jacksonville sells 13 per cent locally and delivers it from its own tank wagons. It is silent as to what portion, if any, the Gulf Refining Company, or the Seaboard Oil Company, or the National Petroleum Company ship from or sell at either of these ports. Suppose the Seaboard Oil Company sold 2 per cent of gasoline and kerosene at Port Tampa or Jacksonville, the Mexican Petroleum Company sold 5 per cent, the Gulf Refining Company sold 10 per cent and the Standard Oil Company sold 13 per cent, what, we ask, would be the proper percentage to indicate whether the commerce was interstate or intrastate? The question of *percentage* of the products *sold at Jacksonville* is *no index* to the *character* of the commerce that goes to the interior points of Florida. Percentage of products sold locally cannot be used, therefore, as a guide to determine the character of the particular commerce that moves through from Mexico, Louisiana or points in other states to interior Florida points. Likewise, the question of where title passes cannot be considered as a measure by which to determine the rate, because one company would be charged the interstate rate and the

company right next to it would be charged the intrastate rate, if the change of title governed the character of the rate.

Tampa and Port Tampa on the West coast of Florida, and Jacksonville on the East coast of Florida, are ports of entry and are in competition with each other, and Tampa and Jacksonville are cities of about the same size. If the intrastate rates are to be applied through the Port of Jacksonville, and it is admitted that the intrastate rates are lower than the interstate rates, then this would create a discrimination in favor of the Port of Jacksonville against the ports of Tampa and Port Tampa. Not only would this create a discrimination between the two ports but it would create a discrimination between the particular oil companies, the shippers. Taking Port Tampa on the one hand, at which this plaintiff sells no oil, and assuming that the Mexican Petroleum Company and the Texas Company located at Tampa, sell 13 per cent of their imports locally in Tampa, the rates to be applied under the reasoning of the Circuit Court of Appeals upon kerosene and gasoline would be interstate from Port Tampa and intrastate state rates from Tampa, thus giving to the Mexican Petroleum Company and the Texas Company at Tampa an undue advantage and preference over its competitors, including this plaintiff, and would handicap the port of Port Tampa, so that the probabilities are that the oil companies would either have to seek locations in Tampa or else the defendant would have to reduce its reasonably low interstate rates to the level of the intrastate rates applicable from Tampa.

The reasoning in the opinion of the Court below from which it finds that the movement of lubricating oil from Port Tampa to interior points, and Tampa

to interior points, and gasoline, kerosene and lubricating oil from Jacksonville to interior points constitutes intrastate commerce, is erroneous, for there is no contradiction in the record of the facts testified to by plaintiff's own witnesses that lubricating oil is pumped direct from ship into tank cars and moves on a tariff rate from Port Tampa to Tampa. It, therefore, does not stop but is in continuous movement from Louisiana fields to Tampa, where it is pumped into a tank. The reasoning is also erroneous as to the movement from Jacksonville to interior points. The Court says (R. 138), referring to lubricating oil:

> "At Port Tampa it is pumped directly from the steamers into the tank cars, which go mostly to Tampa. At the Tampa warehouse it is pumped from the tank cars into storage tanks, and then *at convenience* is put into tank wagons or into barrels or some other small containers in which it is partly sold to the general public and partly sent along to the local filling stations maintained by the company. If any of it goes in bulk from Tampa to the bulk stations, that does not appear, and would not be controlling in any event. An unstated but small fraction goes in the tank cars directly from Port Tampa to the bulk stations, but, for the reasons to be stated with regard to Jacksonville, this fraction can not be deemed to make a continuous through journey. As to all lubricating oil rehandled at Tampa, we find that by this second halt and handling within the state, by its substantial *change of form* for future shipment, and by its *devotion in its new form,* in large part if not wholly, to general public distribution and sale, it loses its status as material in the course of interstate transportation and takes on a predominently local character."

As authority for this decision the Court cites the cases of *Penn. R. R. v. Knight, Arkadelphia Company v. S. L. & S. W. R. R., Sou. Pacific R. R. v. Arizona,* and *Missouri v. Kansas,* already referred to, which cases are also relied upon by Counsel for the Oil Company here, but the Court overlooked what this Court said in the case of *Western Oil Refining Company v. Lipscomb,* 244 U. S. 346. The facts in that case were as follows: The plaintiff had an oil refinery in Illinois and a steel barrel factory in Indiana and sold its products upon orders taken by traveling salesmen in its employ. To fill these orders in Maury County, Tennessee, it shipped into that county from its refinery a tank car of oil and from its factory a car of steel barrels. Both cars were billed to it at Columbia in that county, and after the orders for that place were filled the cars were rebilled to the plaintiff at Mount Pleasant in the same county, where the orders from the latter place were filled. At both places the orders were filled directly from the cars by a traveling agent of the plaintiff and the purchase price was collected at that time—this being what was contemplated at the time when the orders were taken. If the order was for both oil and barrels the oil was drawn out of the tank car into the barrels and the two were jointly delivered; if the oil alone was ordered it was drawn from the tank car into barrels, otherwise provided by the buyer. When the cars were originally shipped they contained just the quantity of oil and the number of barrels required to fill the orders from the two places, and plaintiff intended that they should remain at Columbia only long enough to fill the orders for that place and then should be sent to Mount Pleasant so the orders for that place could also be filled. The quantity of oil and the number of barrels required to

fill the orders for Mount Pleasant were in the cars continuously from the time of original shipment until the cars reached that place. The plaintiff had no office or local agent in Tennessee, nor any oil depot, storage tanks or warehouses in that state.

Tennessee collected an occupation tax from the plaintiff and it sued to recover back the money. The Supreme Court of Tennessee held that the movement from Columbia to Mount Pleasant was intrastate, the interstate movement having been completed and the shipment having come to rest at Columbia, and, therefore, that was an adequate basis for exacting the tax. The Court, in distinguishing the case from the case of *Gulf, S. & F. R. R. v. Texas,* 204 U. S. 403, at page 349, says:

> "It is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated, and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done, and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, *a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder.* * * * Here, when the cars were started from Illinois and Indiana, it was intended by the shipper, as is expressly conceded, that they should be taken to Columbia, Tennessee, *where a portion*—a definite portion—of the contents of each *was to be taken out and delivered,* and that the cars, with the *remainder* of the contents, *should proceed to Mount Pleasant in the same state;* and this is what actually was done. Columbia was the destination of only a part of the mer-

> chandise, not of all. As to part, it was merely the place of a temporary stop en route. The original billing to Columbia and the rebilling from there to Mount Pleasant operated in the same way as would an original billing to Mount Pleasant with the privilege of stopping en route at Columbia to deliver a part of the merchandise. * * * Certainly the transportation of the merchandise destined to Mount Pleasant was not completed when it reached Columbia; nor was the continuity of its movement broken by its temporary stop at that place. As to that merchandise the journey to Columbia and the journey from there to Mount Pleasant were not independent, each of the other, but in fact and in legal contemplation were connected parts of a continuing interstate movement to the latter place."

And the Court declared the tax void because it was one imposed for carrying on interstate commerce. In what respect then is the difference between the facts in that case and the facts in this case in regard to the movement of the products from Jacksonville to interior points, whether it be stopped temporarily at Tampa for the purpose of barrelling or Jacksonville, for the purpose of selling a portion at that point. The movement to interior points was intended to go there in the beginning and the mere temporary stoppage at Jacksonville was only incidental, as shown by this case.

In the case at bar the lower Court says that the lubricating oil rehandled at Tampa takes on a substantial change of form for future shipment and by its devolution into such new form loses its status as material in the course of interstate transportation. The only change of *form* is in the *method* of shipment and not in the *character* of the article. Neither the form nor the character of the oil is changed. It is simply

shipped in smaller containers, to wit, barrels, instead of being shipped to such points in tank cars in which it is carried from Port Tampa to Tampa. The container in which it moves does not affect and cannot change the commodity itself. If a woman bobs her hair she does not thereby become a man, and if she changes from a dress to a one-piece bath suit, although encased in different clothing, she is still a woman. Suppose, for instance, a cargo of fuel oil left Tampico, Mexico, for Port Tampa and the ship was wrecked off the coast of Florida and a *portion* of the oil was recovered and taken to Port Tampa and thence shipped to the phosphate mines in the Bone Valley District. Because of the fact that *all* of the shipment from Tampico was not transported to the Bone Valley District would not be reason why the *character* of the oil that *did go* to the Bone Valley District was changed. In the *Lipscomb case, supra,* the oil was actually shipped to Columbia, Tennessee, in a tank car and a *portion* (and the record does not show what portion) was taken from the tank car at that point, barrelled and delivered to purchasers. The *balance* of the oil was then carried to Mount Pleasant and there delivered. Likewise, the carload of steel barrels was carried to Columbia and a *portion* (the record does not show what percentage) of the shipment was taken out and delivered to purchasers at that point and the *balance* was forwarded to Mount Pleasant, *there to be used either in one or two ways,* to be sold to purchasers of the barrels, or to be used by the plaintiff to place therein oil which was then contained in the tank car forwarded from Columbia. But, as the Court said, the rebilling from Columbia of the *balance* of the shipment *did not require any part of the shipment to be*

classified differently from the remainder. The remainder, according to the Court, proceeded to Mount Pleasant *in the same state.* There is no difference between such a movement than there is between a shipment moving in interstate commerce on milling in transit rates. Grain moving upon milling in transit rates in interstate commerce changes its character. For instance, wheat starts its journey as a grain and completes its journey as manufactured flour. The *character* of the wheat has actually been changed but the *commerce* itself was *intended* to go through in its altered shape and in interstate commerce, and interstate rates are, therefore, applied. The same amount of flour is not delivered at destination as the amount of wheat originally shipped. There is a portion wasted or destroyed and a portion, the husk or shell, which becomes a by-product, and does not complete the original journey.

So that the Court below fell into error in holding that the lubricating oil from Port Tampa and Jacksonville and the gasoline and kerosene from Jacksonville changed their character from interstate to intrastate commerce by reason of the stoppage at these points. We maintain that such stoppages were mere incidents and were *temporary* resting places in a through movement, and the fact that some comes to rest permanently at Jacksonville, by being sold locally and delivered in tank wagons, cannot affect that portion which goes through and was intended from the beginning to go through from Port Tampa and Jacksonville to interior Florida points.

In *Stafford v. Wallace, supra,* the Chief Justice in stating the facts used this language:

> "It was conceded that of all the live stock coming into the Chicago Stock Yards and going out only a small percentage, less than 10 per cent, is shipped from or to Illinois." (258 U. S. 502.)

In the case of *Railroad Commission v. Worthington*, 225 U. S. 101, the question involved was the application of rates on coal billed from Ohio coal fields to Lake Erie ports *and reshipped thence by vessel* to points in other states. The Railroad Commission of Ohio undertook to fix a rate of 70 cents on the coal for the haul from Ohio mines to Huron, Ohio, a port on Lake Erie and to enforce this rate on so-called "lake cargo coal." The *vessels* for the coal were *generally furnished by the operators but sometimes the coal was sold f.o.b. vessel, title passing to the purchaser upon the coal being loaded.* When the coal left the mines it was not known definitely in what vessel it would be loaded, *nor to what particular ultimate destination it would go,* and sometimes the coal was sold and the vessels for the lake transportation were procured *after the coal had arrived at the ports.* It was held "that *this coal was intended from the first to be transported by vessel to other states,* was an interstate movement from the mines to the ports, although billed locally to the ports in the same state in which it originated. The Court held that *neither the fact of accumulation of large quantities of coal at the ports, nor the fact that a relatively small portion of this coal was never reshipped therefrom,* would alter or affect this essentially interstate character of the traffic.

The Court says:

> "It is true, as argued by the learned Counsel for the Commission, that this coal may be accumulated in large quantities at Huron, and only taken

out of the accumulated lots from time to time, when it is to be put upon vessels and shipped out of the state, but it must always be remembered that this 70 cent rate applies *solely to such coal as is in fact placed upon vessels for carriage to beyond the state points;* and, as the circuit court said, *the substance of things is not changed by the fact that a small part may be unloaded at one of the Ohio Islands in Lake Erie.*

"The situation then comes to this: *That the rate in force is applicable only to coal which is to be carried from the mines in Ohio to the Lake, there placed upon vessels and thence carried to upper lake ports beyond the state.* By every fair test the transportation of *this* coal from the mine to the upper lake ports is an interstate carriage intended by the parties to be such, and the *rate* fixed by the Commission, which is in controversy here, *is applicable alone to coal which is thus, from the beginning to the end of its transportation in interstate carriage;* and such rate is intended to and does cover an integral part of that carriage, the transportation from the mines to the Lake Erie port, the placing upon the vessel and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage." (Pages 108-109)

And the Court declared the order of the Railroad Commission of Ohio to be an attempt to directly regulate and control interstate commerce and enjoined its enforcement.

It seems, therefore, that this Court has distinctly held when the parties contract for large shipments of products to be sold in another state and to be concentrated at a port that interstate rates apply to the through movement, but that the *rates apply* only to such portion of the shipments as are transported from

the *point of origin through to the destination, and the fact that a small portion of such shipments does not go through to destination in interstate commerce does not affect the character of that portion of the shipments which makes the entire interstate journey.*

The Railroad Commission in that case relied upon the case of *Gulf, Colorado & Santa Fe Ry. v. Texas*, 204 U. S. 403, which the plaintiff relies upon here, but the Supreme Court says:

> "There it was sought to hold a railroad company upon a shipment of corn from Texarkana to Goldthwaite, Texas, for a violation of the regulations of the state railroad commission applicable to intrastate carriers. The company contended that the shipment was in fact an interstate carriage from Hudson, S. D., to Goldthwaite, Texas. The facts showed that the corn was carried upon a bill of lading from Hudson to Texarkana, and that afterwards, some five days later, it was shipped from Texarkana to Goldthwaite, both points in the State of Texas. This was held to be an intrastate shipment unaffected by the fact that the shipper intended to reship the corn from Texarkana to Goldthwaite, for, as this Court held, the corn had been carried to Texarkana upon a contract for interstate shipment, and the reshipment five days later upon a *new* contract was an independent intrastate shipment. It is evident from this statement of facts that the case is quite different from the one under consideration. There a *new* and *independent* contract for intrastate shipment was made, the interstate transportation having been completely performed; here a rate is fixed on that part of an interstate carriage which includes the actual placing of the coal into vessels ready to be carried beyond the state destination." (Page 109)

Likewise, there can be no application of the facts of that case to the facts in this. They are directly opposite. Here the interstate transportation of the petroleum products has not ended, nor is it intended that it shall end or be completed at Port Tampa or at Jacksonville, but the continuing intention and the custom and practice of the plaintiff in this case, and of its customers and its agents at its bulk and service stations at interior points in Florida, is that these products which come to Port Tampa and Jacksonville, except that small portion used locally at Jacksonville, are not to come to rest and end the journey at these points, but are to continue through to the interior points in Florida in fulfillment of contracts previously made, or to fill its tanks at its bulk and service stations in accordance with information which the Oil Company has obtained from those bulk and service stations as to their needs from time to time, and to be sold and delivered therefrom.

Of the *Gulf case* the Court said:

> "There a new and independent contract for intrastate shipment was made" (page 109).

And that was the turning point of the case. That was the fact which showed the original intention of the parties. Here, there is no new or independent contract, and here the original intention of transportation has not been completed when the oil is transferred from the vessel to the Oil Company's tanks at those ports. The lubricating oil at Port Tampa, as the record shows, does not even stop or come to rest at Port Tampa, but is pumped directly from shipside into tank cars and rushed by rail to Tampa and there placed in the plaintiff's tanks; and the only reason for not doing

the same thing with gasoline and the other products is that the movement is so tremendous in volume that sufficient cars could not be placed to unload the vessels and carry the commodities through to interior points at once, and the contracts for fuel oil provide it shall be used only at the phosphate mines. The complaint alleges as to the lubricating oil at Jacksonville, "About 10 per cent of the lubricating oil at Jacksonville is used locally, or *occasionally leaves Jacksonville in tank cars* for points in South Florida" (R. 7). And it must be borne in mind that the complaint alleges that gasoline, refined oil and fuel oil at Jacksonville are received and sold in exactly the same way as at Port Tampa.

One of the latest cases decided by this Court upon the question in dispute in this case is *Peoples Natural Gas Company v. Public Service Commission of Pennsylvania,* 270 U. S. 550. The Peoples Company is a public service corporation created under the laws of Pennsylvania and engaged in producing, purchasing, transporting by pipe line, and selling natural gas. It *purchases* about two-thirds of the gas which it transports and sells from a producing company in West Virginia having pipe lines leading from that state to the boundary of the two states, and it *produces* the other one-third from its own oil wells in Southwestern counties of Pennsylvania. It has a system of pipe lines in Pennsylvania which is connected at the state boundary with the lines of the West Virginia company, and leads thence to Pittsburgh, Johnstown and other Pennsylvania cities and boroughs, where it sells the gas. The gas coming from West Virginia is transported through the pipe lines as connected at the state boundary in a continuous stream from the place of

production in one state to those of consumption in the other. At the state boundary that gas passes through a registering meter and that point is treated as the place of delivery to the Peoples Company, *but the transportation is not interrupted there.* The gas from the gas wells in Pennsylvania is fed into the moving stream at different points after it crosses the state boundary. The movement of the stream towards the point of destination is accelerated by means of pumps in Pennsylvania—one near the state line and one remote from it. The Peoples Company sells directly to consumers at the several places of consumption other than Johnstown, and there it sells to an independent company, which in turn sells to consumers. The Gas Company had a contract under which for upward of ten years gas was supplied to the Johnstown Company, but in the contract the Peoples Company had reserved the privilege of terminating it, and this privilege it exercised.

Thereupon, the Public Service Commission made an order requiring the Peoples Company to continue to supply gas to the Johnstown Company as theretofore, proceeding on the theory that the Peoples Company was a public service corporation and could be required, irrespective of the terms of the contract, to continue supplying gas to the local company and thus continue its indirect service to Johnstown consumers. The Supreme Court of Pennsylvania held that the transportation of the gas in Pennsylvania was intrastate commerce and this Court, in speaking of this decision of the Pennsylvania Court, says:

> "The first ground of the decision is based on two conclusions: One that, as the West Virginia gas is delivered at the state boundary and the title

> passes there, interstate commerce ends at that boundary and all further transportation and sale in Pennsylvania are in intrastate commerce."

This Court, however, seems to have differed with the Pennsylvania Court, and at page 553, says:

> "As respects the West Virginia case we are of the opinion, in view of its continuous transportation from the places of production in one state to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that *the passing of custody and title* at the state boundary *without arresting the movements to the destinations intended* are minor details which do not affect the essential nature of the business" (page 554).

It will be noted that this case involved the question of delivery of gas from a producing company in West Virginia to another company at the state boundary and the transportation by the gas from the state boundary of the state through the state to an interior point and delivery of the gas at that interior point, the title passing at the state boundary. So it seems to us that there can be no distinction between the facts and principles involved in that case and the facts and principles in this, and the Court held that the entire movement of gas from the West Virginia fields to and beyond the border of Pennsylvania and through the state to the interior points therein, though mingled with gas produced in Pennsylvania, was a part of the transportation originally contemplated when the gas begun its journey in West Virginia and was throughout its entire transaction interstate commerce.

Another late case decided by this Court is *Binderup v. Pathe Exchange*, 263 U. S. 291. In that case the plaintiff sued the defendant under the Anti-trust Act, the plaintiff being an exhibitor and owning a moving picture show at Minden, Nebraska, and operated, as lessee, theatres in other places, to all of which, including his own, he supplies moving picture films and advertising matter connected therewith. He was also in the business of selecting and distributing to a circuit of moving picture theatres, films and advertising matter accompanying them, under agreements with twenty or more operators in various parts of the state. The defendants were also distributors located in New York, and were engaged in manufacturing motion picture films and distributing them throughout the United States. Plaintiff claimed that the defendant by unfair means put him out of business. The Court says (page 309):

> "The film contracts were between residents of different states, and contemplated the leasing by one to the other of a commodity manufactured in one state and transported and to be transported to and used in another. The business of the distributors, of which an arrangement with the exhibitor here was an instance, was clearly interstate. It consisted of manufacturing the commodity in one state, finding customers for it in other states, making contracts of lease with them, and transporting the commodity leased from the state of manufacture into the states of the lessees. If the commodity were consigned directly to the lessees, the interstate character of the commerce throughout would not be disputed. Does the circumstances that, in the course of the process, the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in

the same state, put an end to the interstate character of the transaction and transform it into one purely intrastate?"

And the Court, in answering this question, said:

> "*We think not. The intermediate delivery to the agency did not end, and was not intended to end, the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination.* The general rule is that where transportation has acquired an interstate character, 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end.'"

In the case at bar we say the point where the parties originally intend the movement shall finally end is the interior destinations in Florida and not the ports of Port Tampa and Jacksonville.

To the same effect is the case of *Douglas Company v. Southern Ry. Co.*, 216 Ill. App. 148-151. That case involved rates on carload shipments of starch by vessels into the port of Charleston and some times reshipped immediately by rail, and at others left in the steamship company's warehouse for *indefinite periods*, the usual storage charges being paid thereon, and later reshipped to points in South Carolina. Some of the starch, however, remained in Charleston where it was sold to a wholesale grocer at that place. The plaintiff knew that such shipments would not remain permanently in Charleston except such starch as might be sold to F. W. Wagner, a wholesale grocer in Charleston. The Court said (page 151):

> "The essential nature of the movement, and not the form of the bill of lading, determined the char-

acter of the commerce involved. When the character of interstate commerce has once been acquired it continues until the load reaches the ultimate point of destination intended, which does not necessarily depend upon the form of the bill of lading or whether there has been a transshipment en route with a new bill of lading for the balance of the journey."

Ala. Great Sou. Ry. Co. v. McFadden, 232 Fed. 1000; Affirmed 241 Fed. 562;
A. T. & S. F. Ry. v. Harold, 241 U. S. 371;
Western Union Tel. Co. v. Foster, 247 U. S. 105;
R. R. Com. of La. v. T. & P. R. R. Co., 229 U. S. 336.

III

DECISIONS OF THE INTERSTATE COMMERCE COMMISSION

The decisions of the Interstate Commerce Commission throw some light upon this case, and although they are not controlling, they are persuasive. The record shows that a great deal of fuel oil is shipped to the phosphate mines in the Bone Valley District of Florida. Originally these mines used coal, and this coal was brought by vessels to Port Tampa and thence reshipped to interior points in Florida.

In *Tampa Fuel Company v. Atlantic Coast Line R. R. Co.,* 43 I. C. C. 231, there were involved shipments of coal moving by vessel from North Atlantic ports to Port Tampa and thence reshipped by rail to various interior Florida points. The complaint alleged unreasonableness of certain handling and wharfage charges of the rail carriers at Port Tampa, as well as the local rates for the rail haul therefrom. The re-

port showed that the coal moved from North Atlantic ports to Port Tampa in *privately chartered vessels;* that the complainant had an agent at Port Tampa who would notify the defendant's agents when a particular vessel was expected to arrive, and would issue instructions as to what portion of the coal should be shipped to Tampa and what portion to other points in the interior of the state. The Railroad Company (this defendant) in that case questioned the jurisdiction of the Commission over the rail movement from the port but the Commission said:

> "The question of our jurisdiction was raised by defendant. The shipments to Tampa did not move under any common control, management or arrangement for continuous carriage or shipment. The record shows, however, that when each cargo of coal was delivered to a water carrier at a north Atlantic port the coal started in transportation, water and rail, to points in Florida beyond Port Tampa. The movement by rail from Port Tampa carried out the original intention entertained at the time the vessels were loaded at the north Atlantic ports. The rail movement from Port Tampa to Tampa, and the handling and wharfage at Port Tampa in connection therewith, as part of interstate transportation, are subject to our jurisdiction."

Later there came before the Commission the case of *International Agricultural Corporation v. Director General,* 60 I. C. C. 726; decided March 5th, 1921, *where the question was raised as to the reasonableness of the rates on fuel oil in tank cars moving from Tampa and Port Tampa, Florida, to points in the Bone Valley District of that state.* This oil was brought into Tampa and Port Tampa by vessel from points in Mexico

and from Texas and other states, was pumped into tanks at that point, and was shipped therefrom in tank cars by rail. *In other words, the Commission had before it the identical question which this Court has in the case at bar,* the transactions being the same. The shippers themselves in that case filed their complaint before the Interstate Commerce Commission, thus recognizing the jurisdiction of that Commission in the premises, and this jurisdiction was not questioned by the carriers. The Commission took jurisdiction of the case and adjudicated the reasonableness of the rates, saying, among other things, in its report:

> "The complaint was brought before this commission on the basis that the rail transportation within the State of Florida is a part of interstate or foreign commerce; and defendants concede our jurisdiction over the rates assailed" (page 111).

This case before the Commission gives a history of the use of this fuel oil in the Bone Valley District of Florida, and it is this fuel oil that the defendant contracts with the owners of the phosphate mines in the Bone Valley District to supply upon contracts made by the year. It will, therefore, be seen that both shippers and defendants conceded that the rates on such oil from Port Tampa were governed by tariffs of the Interstate Commerce Commission.

It is rather singular that the plaintiff Oil Company in this case should claim any refund or overcharge on shipments of fuel oil from Port Tampa to the Bone Valley District of Florida, where it ships fuel oil upon contract to the phosphate mines. The contract (Plaintiff's Exhibit No. 7, R. 121) clearly shows that the freight on this oil from Port Tampa to the phosphate

mines of Florida in the Bone Valley District, is paid by the purchasers from the Oil Company. The sample of contract placed in evidence shows an agreement dated October 31st, 1924, between the plaintiff Oil Company and the Florida Phosphate & Mining Corporation, Bartow, Florida, for 50,000 barrels of Mexican fuel oil for delivery during the period of twelve months from November 15th, 1924, and the price to be paid is $1.35 per barrel of 42 U. S. standard gallons in *tank cars f. o. b. Port Tampa, Florida.* The phrase "f. o. b." means free on board of vessel, car or other conveyance which is to transport the goods to the buyer and means, in ordinary business dealings, that the buyer pays the freight from the point at which the shipment is delivered free on board cars. Now, it was the Phosphate Companies, the buyers from this plaintiff in this case, who so strenuously contended that the Interstate Commerce Commission had jurisdiction in the case of *International Agricultural Corporation, supra.*

An examination of the record in that case discloses that the following language was used in paragraph 4 of the complaint:

> "Such fuel oil so shipped from Tampico and other points in Mexico to points in the 'Bone Valley District' of Florida via Tampa and Port Tampa is known and intended at the time of shipment from Mexico to find its destination beyond such ports of entry. The details of physical handling at the ports of Tampa and Port Tampa, the method of billing and the transference of title at such ports, are but incidents of a movement from Mexico to points in the interior of Florida. Interruption of through movement occurs at the Florida ports of entry in order to transfer the oil from tank steamers to cars, and temporary stor-

age at the ports is resorted to for such purpose as well as to equalize the incoming shipments with the periodical requirements of customers in the 'Bone Valley District' and elsewhere.

"Complainants, therefore, aver that such transportation of fuel oil by railroad from Tampa and Port Tampa, Florida, to points in the 'Bone Valley District' of Florida is but the substantial continuation of an original movement from an adjacent foreign country, and the rate charged for such rail haul from the ports of entry is the rate applicable to the movement of foreign commerce from an adjacent foreign country to a point within the United States, within the definition and scope of Section 1 of the Act to Regulate Commerce, as amended from time to time."

In the brief in that case counsel for the Phosphate Companies used this language (page 210) in urging their contention before the Interstate Commerce Commission that the entire movement from Mexico to the phosphate mines in the Bone Valley District was interstate commerce:

"It appears in this case that the oil used is Mexican fuel oil which is brought to Port Tampa in vessels owned by the Oil Company. There the oil is unloaded and placed in storage tanks, from which it is shipped on a new bill of lading by railroad to the phosphate district. Of the total quantity of fuel oil thus brought into Port Tampa between 85 per cent and 95 per cent is intended for and destined to mines in the phosphate district. Temporary storage at the port is resorted to in order that the supply of oil may be equalized with the daily needs of the rock industry.

"The contracts between the Oil Companies and the phosphate rock miners contain provisions clearly indicating the intention that the oil fur-

nished shall be Mexican oil. Thus, in each of the contracts, provision is made for the payment of export duties that may be imposed by the authorities of the state of Mexico. * * * Thus the conclusion is self-evident that at the time the oil leaves Tampico, or other points in Mexico, it is known the ultimate destination is the phosphate district.

"Under such circumstances there cannot be any serious question that the Commission has jurisdiction over the rail rates from the ports. Such rail haul is but the substantial continuation of the original movement from a foreign country."

A late decision by the Interstate Commerce Commission is *Alexander Grocery Co. v. Beaumont, Sour Lake & Western Ry. Co.*, 104 I. C. C. 155, decided November 9th, 1925, which involved shipments of green coffee from New Orleans, Louisiana, to La Grange, Austin and San Antonia, Texas, and from Galveston and Houston, Texas, to Austin and San Antonio, Texas. The defendants challenged the jurisdiction of the Commission as to the movement from Galveston to Houston upon the ground that the transportation was intrastate commerce.

The Commission says (page 156):

"Defendants in the title case challenge our jurisdiction over the shipments from *Galveston and Houston* on the ground that the transportation is intrastate. Green coffee is not produced in the United States, Generally speaking, the foreign producers sell their products to importers located at the ports of entry, and these importers distribute the coffee to roasters located at the ports and interior points. Upon arrival at the ports the coffee is stored in warehouses to await reshipment beyond. *The temporary storage at the ports does*

not divest this traffic of its foreign character acquired at the time it begins its journey from the foreign port. The movement to the Gulf ports is only a step in its transportation to the interior destinations."

How similar the situation in that case is with the case at bar!

IV

CASES RELIED ON BY THE OIL COMPANY DISTINGUISHED

In the Courts below the plaintiff relied mostly upon tax cases, although he cited some other cases, such as *Gulf, Colorado & Santa Fe v. Texas*, 204 U. S. 403, and *Sou. Pac. Ry. v. Arizona*, 249 U. S. 472 (the circus case), and *Arkadelphia Co. v. S. L. & S. W. R. R. Co.*, 249 U. S. 134.

The underlying principles covering the two kinds of cases are totally different and the tax cases throw but little light on this subject.

The decisions in the tax cases are all bottomed on this principle:

> "The Interstate Commerce Clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative, *unless it is in actual continuous transit in interstate commerce.*" (*Champion Realty Co. v. Brattleboro*, 260 U. S. 367).

The decisions in the rate cases, however, on the other hand are founded on the principle that Congress has *exclusive* control to prescribe rates and to regulate interstate commerce.

In *Railroad Commission of Ohio v. Worthington*, 225 U. S. 107, the Court says:

> "It is not necessary to review the cases in this Court which have settled beyond peradventure that the national government has exclusive authority to regulate interstate commerce under the Constitution of the United States; nor to do more than reaffirm the equally well-settled proposition that over interstate commerce transportation rates the state has no jurisdiction, and that an attempt to regulate such rates by the state or under its authority is void."

And at page 111 the Court says:

> "It is enough to now hold, as we do, that the establishing of the rate in question is an attempt to regulate interstate commerce, and is therefore beyond the power of the state or a commission assuming to act under its authority."

In *Texas, etc. R. R. v. Sabine Tram Co.*, 227 U. S. 112, it was said:

> "If the shipments were foreign commerce it is hardly necessary to make explicit the principle that the national dominion over them is supreme; and, conversely, if the shipments were not of that character, they were subject to the regulating power of the state."

In *Binderup v. Pathe Exchange*, 263 U. S. 291, heretofore noted in this brief, which involved the transportation of moving picture films, the defendants in error relied upon these same tax cases to uphold their contention that the commerce involved was intrastate commerce, but Mr. Justice Sutherland, in writing the opinion of the Court and holding that the commerce was interstate, disposed of this contention in the following words:

> "The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. *It does not follow that, because a thing is subject to state taxation, it is also immune from Federal legislation under the commerce clause.*"

The Court calls attention to the same thing in *Stafford v. Wallace*, 258 U. S. 495, at page 525, where, in distinguishing the cases relied upon by the appellant, it says:

> "The other cases relied on by the appellants are less relevant to this discussion that the *Anderson* and *Hopkins* cases. Some of them are tax cases. As to them it is well to bear in mind the words of the Court in the *Swift case*, (page 400): 'But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress where such interference is deemed necessary for the protection of commerce among the states.'"

In the case of *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, relied on by the Oil Company, the Court, referring to certain state decisions and saying that the state court misapplied a certain opinion of this Court, says:

> "But these decisions were made simply out of deference to conclusions drawn from *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192, and we are of the opinion that they carry their conclusions too far. That was the *case of a tax* and was distinguished expressly from an attempt by a state directly to *regulate transportation* while outside of its borders."

The *Hanley case* was one involving the right of the state to fix rates for transportation.

The same differentiation of these tax cases is made in *Lemke v. Farmers Grain Co.*, 258 U. S. 50, where, in concluding that the commerce involved was interstate, the Court says:

> "Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and Federal authority under facts presented, *which required a defination of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration*" (Page 55).

The general rule as to validity of state taxation under the commerce clause is tersely put by Mr. Justice Brandeis in a dissenting opinion, concurred in by Mr. Justice Holmes, in the recent case of *Texas Transport & Terminal Company v. City of New Orleans*, 264 U. S. 150, as follows:

> "From the multitude of cases this general rule may be deduced. The validity of a state tax under the commerce clause does not depend upon its character or classification. It is not void merely because it affects or burdens interstate commerce. The tax is void only if it directly burdens such commerce, or (where the burden is indirect) if the tax *discriminates* against or *obstructs* interstate commerce" (page 154).

The same principle was stated another way by the Court in the case of *Swift v. United States*, 196 U. S. 375, where the Court said:

> "But it may be that the question of taxation does not depend upon whether the article taxed may or may not be set up in the course of commerce between the states, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it."

Counsel for the Oil Company also relied upon the case of *Addystone Pipe & Steel Co. v. United States,* 175 U. S. 211. In that case the Court differentiates the tax cases and holds that the commerce involved is interstate, and says:

> "Decisions regarding the validity of taxation by or under state authority, involving sometimes the question of the point of time that an article intended for transportation beyond the state ceases to be governed exclusively by the domestic law and begins to be governed and protected by the national law of commercial regulation, *are not of very close application here.* The commodity may not have commenced its journey, and so may still be completely within the jurisdiction of the state for purposes of state taxation, and yet at the same time the commodity may have been sold for delivery in another state." (pages 245 and 246)

It follows, therefore, from what has been said that unless the traffic involved is in actual continuous transit in interstate commerce the state may lawfully tax it unless the tax is discriminating, but it also follows that the state is absolutely without any authority to prescribe rates for interstate traffic, whether such traffic is in actual continuous transit or not.

There is no inhibition in the Constitution against the taxation of interstate commerce by the state. The inhibition arises from the grant of power to Congress

and the intent manifested thereby to relieve interstate commerce from regulations or burdens imposed upon it by the states, and thus the validity of a state tax, therefore, depends upon, and is determined by, the question as to whether the tax is a regulation of, or imposes a burden upon, such commerce.

In the *Sonneborn case,* 262 U. S. 506, relied upon by the Oil Company, which was a case involving the question of taxation upon oil by the State of Texas, Mr. Chief Justice Taft says (page 508):

> "The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas to their warerooms or warehouses in Texas, there held for sales in Texas in original packages of transportation, *and subsequently sold and delivered in Texas* in such original packages, may be made the basis of an occupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sales and delivery in Texas.
>
> Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce?"

We submit that no such question as that asked by the Chief Justice in that case arises here.

If the oil in this case was shipped to warehouses of plaintiffs at its bulk stations at interior points in Florida and there afterwards stored and sold within the state, there is no question that such oil would be subject to a tax by the State of Florida; and upon such a state of facts existing the rates for the transportation from such interior point to other points where the oil might be sold, would be governed by intrastate rates.

In the *Sonneborn case,* however, in holding that a

part of the commerce was interstate, the Chief Justice says (page 515):

> "Many of the sales made by the appellants were made by them *before the oil to fulfill the sales* were sent to Texas. These were properly treated by the state authorities as exempt from state taxation. They were, in effect, contracts for the sale and delivery of oil *across state lines.* The solicit ing of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence and any state tax upon it is a regulation upon it and a burden upon it."

Here the admitted facts are that the sales of fuel oil are made for a year at a time prior to the time the oil leaves Mexico, and while the contract is made f.o.b. Port Tampa, nevertheless the contract shows that the oil is for delivery at Royster, Florida, because Section 1 of the contract (R. 121) says:

> *"The oil is to be used exclusively at the plant of the buyer at Royster, Florida, and must not be resold by the buyer."*

And as to the other products, it is shown that they are not to be used at Port Tampa but at bulk and service stations at interior points *where sales and deliveries are made.* Therefore, there is nothing in the Sonneborn case, as we read it, that militates against the position taken by the defendant.

Plaintiff's counsel also rely upon the case of *Penn. R. R. v. Clark Bros.,* 238 U. S. 456, involving coal sold at the mouth of mines in Pennsylvania and which the purchaser was to carry into another state. The suit was brought to recover damages for inadequate and unjustly discriminatory car service and supply. Mr. Justice Hughes wrote the opinion and says (page 465):

"There is no controversy as to the course of business. The plaintiff sold to persons within and without the State of Pennsylvania. The coal was loaded on cars to be transported to various points of destination not only in Pennsylvania, but in other states. The transportation to other states absolutely depended upon a proper supply of cars, and it is manifest that unjust discrimination against the plaintiff in car distribution would improperly obstruct the freedom of such transportation, in which the plaintiff had a direct interest. And the question presented is whether unjust discrimination of this character is a subject which falls without the scope of the jurisdiction conferred upon the Interstate Commerce Commission; that is, whether there is an absence of such jurisdiction *merely because the plaintiff sold its product, which was to be transported to other states, f.o.b. at its mines.*

"This question must be answered in the negative. In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative. If the actual movement is interstate, the power of Congress attaches to it and provisions of the act to regulate commerce, enacted for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply."

Notwithstanding that the movement of cars from a mine embraced interstate commerce, nevertheless the coal itself may have been subject to taxation under the laws of the State of Pennsylvania, so, therefore, we do not think this case is authority for the plaintiff's position.

Plaintiff also relies on the case of *Sou. Pac. Ry. Co. v. Arizona,* 249 U. S. 472. The facts in that case pre-

sent a different status than in this case. That case involved the movement of a circus which was traveling from point to point in Arizona, and giving exhibitions in various towns in that state. From Arizona the circus intended to go to some other state. The railroad claimed that the proper fare to charge was the interstate fare, because it was the intention of the circus company eventually to leave the state of Arizona, when it had finished its exhibitions, and go to some other state. This Court held that the movement was intrastate, and on page 477 says:

> "The mere intention of the shipper to ultimately continue his tour beyond the state of Arizona did not convert the contemplated intrastate movement into one that was interstate."

We do not dispute the correctness of this decision. To our mind it did not involve the purchase and shipment of an article in commerce from a seller in one state to a buyer in another. The circus had various contracts to give exhibitions in various towns within the state. Naturally, its sphere of activities was limited and it would eventually have to go to some other state for further business. Because it might at some future time eventually leave the state of Arizona could not change the character of its tour while within the state of Arizona. Each movement of the circus was an entirely separate and independent movement from the other. Its movements did not result, as in the case at bar, in a constantly recurring course of business flowing in interstate commerce.

Nor, do we think the case of *Arkadelphia Milling Co. v. S. L. & S. W. Ry. Co.*, 249 U. S. 134, has any relation to the facts in this case.

The Court in that case held that the movement of rough lumber from the forest to milling points in the state, followed by the forwarding of the finished product to points outside of the state did not constitute interstate commerce so as to render inapplicable the rough material intrastate freight rates prescribed by state authority, although experience indicated that 95 per cent of the product must be marketed outside of the state, where it was not intended, when the rough material left the woods, that it should be transported out of the state or elsewhere beyond the mill until it had been subjected to a manufacturing process that *materially changed its character, utility and value,* and that after the product was manufactured it was stored at the mill *to await a market, the manufacture and storage occupying five months on the average.*

Counsel for the Oil Company laid much stress upon this case in the court below and cited the following from page 151 of the opinion of the Court:

> "Upon the facts as stated, it is our opinion that the district court erred in treating the movement of the rough lumber from the woods to the milling point as interstate commerce. It is not merely that there was no continuous movement from the forest to the points without the state, but that when the rough material left the woods *it was not intended* that it should be transported out of the state, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its *character, utility, and value.*"

There is a marked difference, however, between the the facts in that case and the facts in this. Here the intention is plainly indicated by the course and conduct of the business done weekly and monthly and

yearly by the parties, and the products undergo no manufacturing process or change their character or utility.

Counsel also relied upon the case of *Missouri v. Gas Co.*, 265 U. S. 298, which involved the transportation of gas in pipe lines by defendant from Oklahoma and Kansas to Kansas City, Missouri, where it was sold and delivered to distributing companies, which latter companies then sold and delivered it to local consumers. The State of Missouri attempted to regulate the price at which the Kansas Company could sell this gas to the distributing companies in Missouri, and the only point in that case was as to whether that commerce was interstate. The Court held that the commerce was interstate, but on page 308 this language is used:

> "With the delivery of the gas to the distributing companies, however, the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation."

And from this quotation Counsel for the Oil Company argue that the delivery of oil at Port Tampa and Jacksonville to the Oil Company ends its foreign or interstate movement. The sole question in that case was the *power* of the State of Missouri to regulate the commerce, which the Court declared to be interstate commerce, and in that case the Court certainly did not overrule any of the cases relied on by the defendants.

Another case relied upon by plaintiff is that of *Penn. R. R. Co. v. Knight,* 192 U. S. 21. The Pennsylvania Railroad operated a cab service in New York to and from the ferry landing at the foot of 23rd Street,

where passengers had to cross the river in order to get to New York. A tax was imposed on cab service by the State of New York and the railroad resisted it on the ground that the cab service was a part of interstate commerce. The railroad tickets did not include a coupon in payment for the cabs, nor did the passenger pay when purchasing his ticket for New York for the cab service. The Court held that the two services, that is, the railroad service upon the one hand and the cab service on the other, were separate and distinct.

The Court said, on page 20 (referring to the cab service):

> "It is independently contracted for and not necessarily connected therewith" (referring to railroad transportation).

And, therefore, it was held that the cab service was interstate business and subject to the state tax.

In referring to the case of *Gulf, Colorado & S. F. Ry. v. Texas*, 204 U. S. 403, also relied upon by counsel for the Oil Company, this Court, in the later case of *B. & O. S. W. RR. vs. Settle*, 260 U. S. 166, says:

> "The decision in *Gulf, Colorado & S. F. Ry. v. Texas*, 204 U. S. 403, relied upon by defendants in error is entirely consistent with these later decisions of this Court, *although some expressions* in the opinion are not" (page 193).

And so we think that none of the cases which the plaintiff has cited to sustain his position rule the question in issue in the case at bar, because the facts and the course of business conducted were altogether different.

V.

OIL CASES FROM NORTH CAROLINA AND FLORIDA.

Counsel for plaintiff will rely upon the case of *Atlantic Coast Line R. R. Co. v. Standard Oil Co. of New Jersey*, 12 Fed. (2d) 541, decided by the Fourth Circuit Court of Appeals, in which this Court denied petition for certiorari.

The record in that case is not as clear-cut and decisive on the facts as the record in this case. That case involved a question, similar it is true to the case at bar, whether petroleum products moving through the port of Wilmington, North Carolina, to interior points, brought into that port by steamer and placed into storage tanks and reshipped therefrom in tank cars and in barrels was interstate commerce.

The Court adopted the findings of fact of the District Judge, among which facts appear the following:

> "Complainant refines gasoline and oils at its refineries at Charleston, S. C., Baton Rouge, La., Baltimore, Md., and other places, and carries the products in its own tank vessels to Wilmington and other ports along the Atlantic seaboard. *At Wilmington it maintains an elaborate plant* for the transfer of these commodities from the vessels, *for the storage thereof and for selling them to customers* throughout the state of North Carolina.
>
> "Upon the arrival of a vessel, the gasoline or refined oil is pumped into the storage tanks through various pipe lines maintained for that purpose, *and the commodities are there held awaiting sale* to complainant's customers or transfer to substations maintined by complainant in various ports of the state.
>
> "*Distribution* of these commodities *from the*

Wilmington plant takes several forms. The principal movement is in tank cars, leased to complainant by a private car company, but hauled in common carrier service by the defendants. Some shipments are made in barrels loaded in box cars. Defendants are not now charging, and have not sought to charge, interstate rates on these barrel shipments. And other distribution is made by tank wagons to customers in Wilmington and nearby territory.

"Wilmington is one station within the jurisdiction of what complainant designates as its Charlotte branch, which embraces most of the State of North Carolina. These stations are supplied not only from Wilmington, but as occasion may require, from Norfolk, Va., Charleston, S. C., and other points at which complainant stores its products. A substation which today received its supplies from Wilmington may tomorrow receive them from Norfolk. During the two years prior to the hearing there were 231 such 'transfers' of stations from one supply point to another, and there have been as many as 35 such transfers at a single time. The executive offices of complainant in New York, N. Y., and Baltimore, Md., determine from time to time the source of supply for the several stations in the Charlotte branch; this matter not being within the jurisdiction of the Charlotte branch manager or the manager of the Wilmington plant. *This indicated that when the products arrive at Wilmington their destination is not definitely known, and this is* confirmed by the testimony" (page 542).

In the case at bar there are no such transfers of stations from one supply point to another. Again, in that case no situation was presented as here, where it is alleged and admitted that practically 95 per cent of fuel oil is sold to customers in Florida on yearly contracts made with customers before the oil is shipped

from Mexico, and where the oil company makes yearly contracts with producers of oil in Mexico to enable it to fill its contracts with customers, and where both sets of contracts require average *monthly deliveries,* and where, therefore, there is a constant flow of oil from the Mexican oil fields to interior Florida points simply passing *through* the ports in execution of *pre-existing contracts,* and where such arrangements had existed for four or five years. Nor yet, in that case is there any such admission, as here, that *none* of it is sold at the ports but that *all* is destined to other points in Florida. To the contrary, the Court finds as a fact that the defendant in the North Carolina case maintained an *elaborate plant at Wilmington* for the *storage* of the commodity and the *sale from there,* and that the commodity was *held at Wilmington awaiting sale or transfer to substations,* and that the *distribution* of the commodities *was from Wilmington.* The Court does not distinguish the case in principle from the *Sabine Tram* case. It simply refers to the *Tram case* and others, by saying that those cases "deal with shipments made to the seaboard for export, and hold that the shipments are to be treated as shipments in foreign commerce from the time that their movement to their foreign destination commences, and that the character of the shipment is not affected by such incidents of transportation as intrastate billings, reconsignment, reshipment at port or milling in transit" (page 547).

The Court says on page 547:

> "But none of these cases have any application here because in all of them the articles of commerce were *unquestionably* in the course of their

> journey to foreign destinations, and the question involved in all of them was whether the character of commerce was changed by certain incidents of the journey. Here the journey of the cargo of oil as a cargo has ended. It had come to *rest* at point of *distribution*, and its identity had been lost."

In this statement the Court assumes as a fact that which was the question in dispute and assumes as a fact what the Texas Court held was not a fact. The Court attempts to distinguish that case from the case of *Binderup v. Pathe Exchange, supra, Stafford v. Wallace, supra,* and *Swift & Co. v. United States, supra,* by simply stating that they are not in point.

The Court says, page 547:

> "That there is a difference in the principles applied to the two classes of cases is apparent at a glance. In the one case it is the essential nature of the *business* which governs; in the other it is the essential nature of the particular *transportation* involved."

The Court differentiates the two cases by differentiating the words "business" on the one hand and "particular transportation" on the other. In the *Stock Yards case* there was transportation and that transportation was held to be interstate commerce. There the business was held to involve interstate commerce. If it involved interstate commerce, the transportation, therefore, of that business was interstate commerce, and the rates applicable upon interstate commerce are those which the Interstate Commerce Commission has approved under authority of Congress.

There the Court finds as a fact that the shipments came to rest at the *port* and the port was the point of *distribution.* Here, however, the uncontradicted facts are that the products are not sold from Port Tampa,

which is only a small agency with few men employed, but the *sales* and *deliveries* are made from bulk or *service stations,* except fuel oil, which is sold on yearly contracts made before shipments begin. There the distribution point was the port of Wilmington. Here the distribution points are the bulk stations at *interior towns or cities* in Florida.

That case, therefore, is not authority for this.

Counsel may argue that a petition for certiorari having been denied in that case, this Court, therefore, affirmed the Fourth Circuit Court of Appeals. That, however, cannot be.

In *Hamilton Shoe Co. v. Wolff,* 240 U. S. 258, the Court says (page 258):

> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

Plaintiff will also rely upon a like and similar decision from the Supreme Court of Florida, *State vs. Seaboard Air Line Ry. Co.* and *State v. Atlantic Coast Line R. R. Co.* (this defendant) 109 Southern 656, and not yet officially reported. From the decision in that case the defendant railroad companies sought from this Court review by petition for *certiorari,* which was granted March 21st, 1927, and the case is therefore, now upon the docket in this Court, being Nos. 505 and 506. The case was decided upon complaint, answer and demurrer and upon motion to file amended answers.

The Florida court held, following the tax cases, that the pretroleum and petroleum products stored in stor-

age tanks at Jacksonville and Tampa come to rest there; that the interstate movement ceases, and that subsequent shipments of it to points within the state are intrastate movements and subject to intrastate rates prescribed by the Florida Railroad Commission, and granted a peremptory writ of mandamus compelling this defendant and the Seaboard Air Line Railway to charge intrastate rates upon such products from Tampa, Port Tampa and Jacksonville to interior points in Florida.

Although the Court found as a fact, that the *reshipment* from the ports was *pursuant to the terms of contracts previously made to supply independent dealers at interior points, or to prearrangements for filling their own stations at interior points;* that the *destinations* of the products intended for *independent dealers* on contracts or for the oil companies' stations at *interior points* are *known and determined before the products leave the point of original shipment;* that the *quantity* of petroleum products to be shipped to each, that is, the independent dealers and the oil companies' *own stations* over a given period of time is determined by the terms of the contracts *made before shipment from the point of origin* for supplying customers, and *their own prearrangements for supplying their stations,* and that most of the property remains that of the oil company *during the entire course of transportation* from points of origin of *shipment to interior Florida points,* it yet fell into error by looking only at one part of the journey, that is the *last leg,* from the port to the interior points, and overlooking the *entire journey* from origin to destination, thereby making, as we maintain, the same mistake that the Circuit Court of Appeals of the Sixth Circuit

made in the case at bar. That was the same mistake made by the Minnesota Supreme Court in the case of *Hughes Bros. Timber Company v. State of Minnesota*, decided by this Court November 23rd, 1926, (not yet officially reported) where the question of the character of timber to be carried from Swamp River to Muskegon, Michigan, was involved.

> "All this characterizes what was being done in the drive between Swamp River entrepot and the mouth of Pigeon River. That was the beginning or the first leg of the interstate journey. The obligations by both parties accorded with that view. *The change in the method of transportation by floating to carriage on a vessel did not affect the continuity of the interstate passage*, if such a passage was intended by the parties and begun, any more than did shipment by local railroad bills of lading from a point in a state to a port of the same state, for shipment by vessel, to a foreign port, prevent its being interstate commerce."

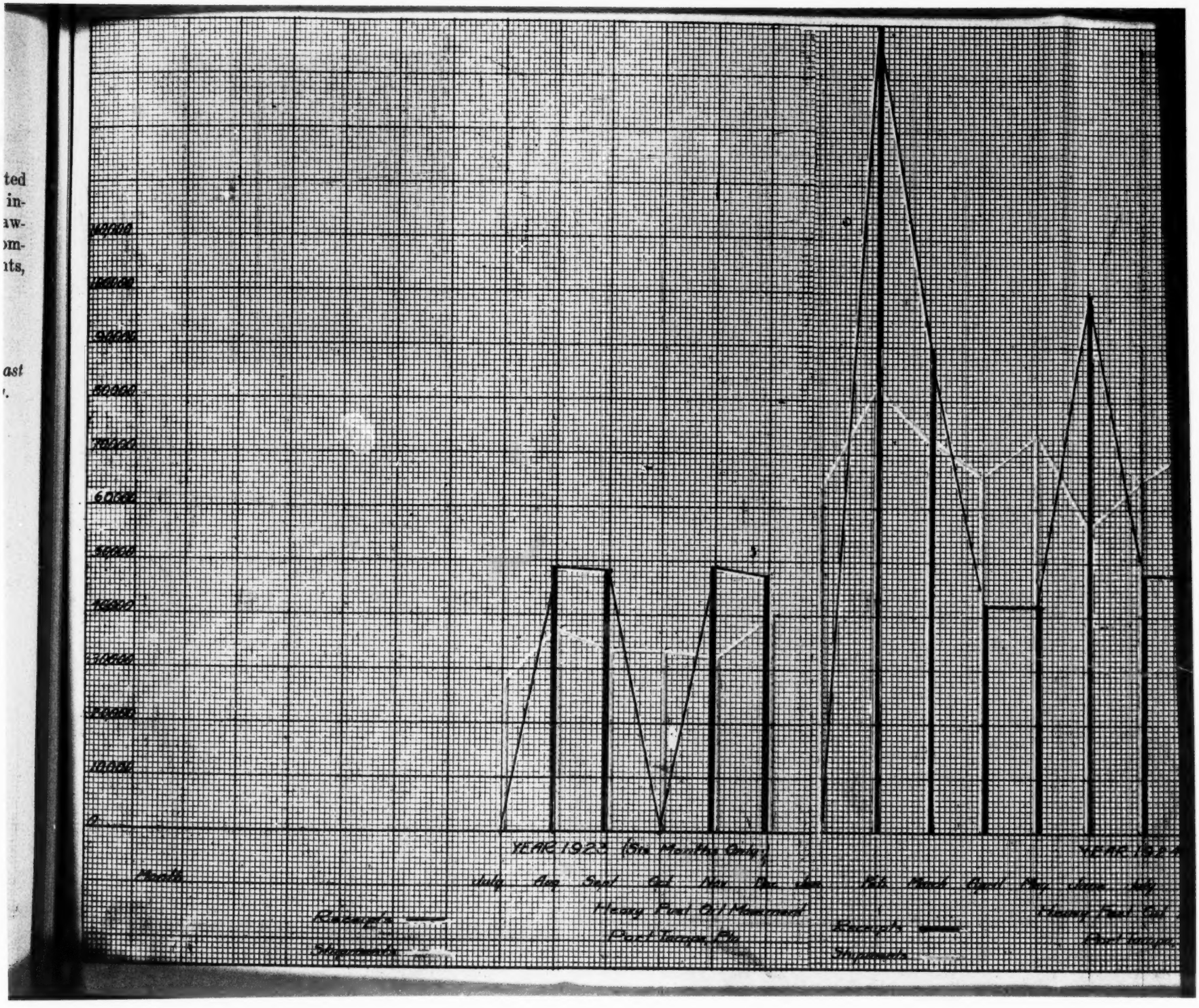
Citing the *Sabine Tram case, Sou. Pacific Terminal case, Worthington case, Settle case* and other cases.

But the Florida Court went further than the Court below did in this case, for the Florida Court decided that *all* of the shipments, even *fuel oil*, and *gasoline* and *kerosene* from *Port Tampa* take intrastate rates, so that this defendant is in the predicament of being *prohibited* from charging interstate rates on any petroleum product from Port Tampa to interior points by order of the Florida Court, and being *required* under the decision of the court below to charge *interstate* rates on certain of these products. We say *required*, because if the commerce is interstate, defendant can apply only such rates, without violating the Interstate Commerce Act.

CONCLUSION

For the reasons given and upon the authorities cited herein, we ask that the commerce be declared to be interstate commerce, and that the rates governed by lawful tariffs filed with the Interstate Commerce Commission be the proper rates charged upon shipments, and that the bill be dismissed.

THOMAS W. DAVIS,
WILLIAM MARSHALL BULLITT,
Attorneys for Atlantic Coast Line Railroad Company.


YEAR 1923 (Six Months Only)
July
Aug
Sept
Oct
Nov
Dec
Jan
Feb
March
April
May
June
July
Heavy Fuel Oil Movement
Fuel Tanker Etc.
Receipts
Shipments

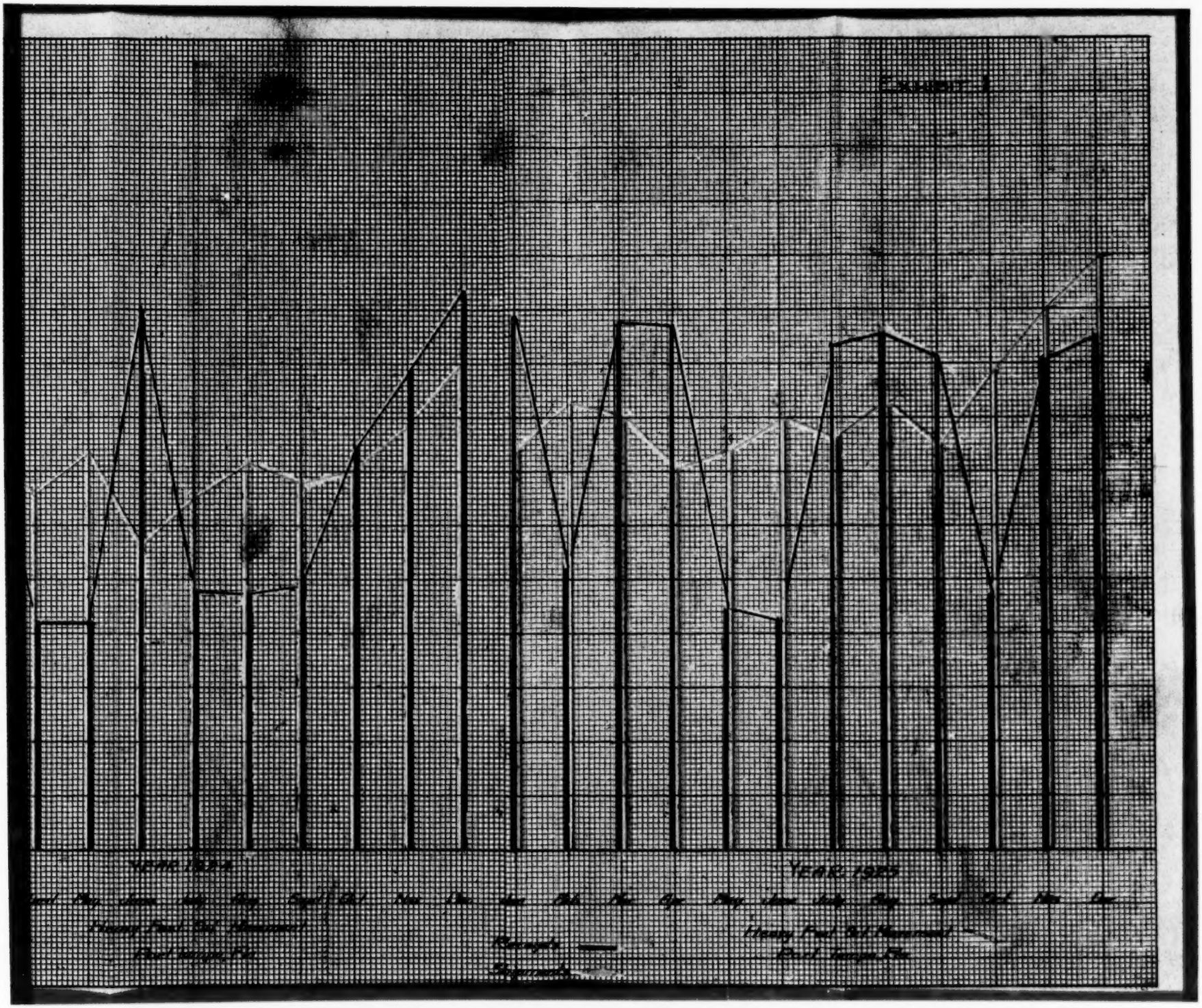
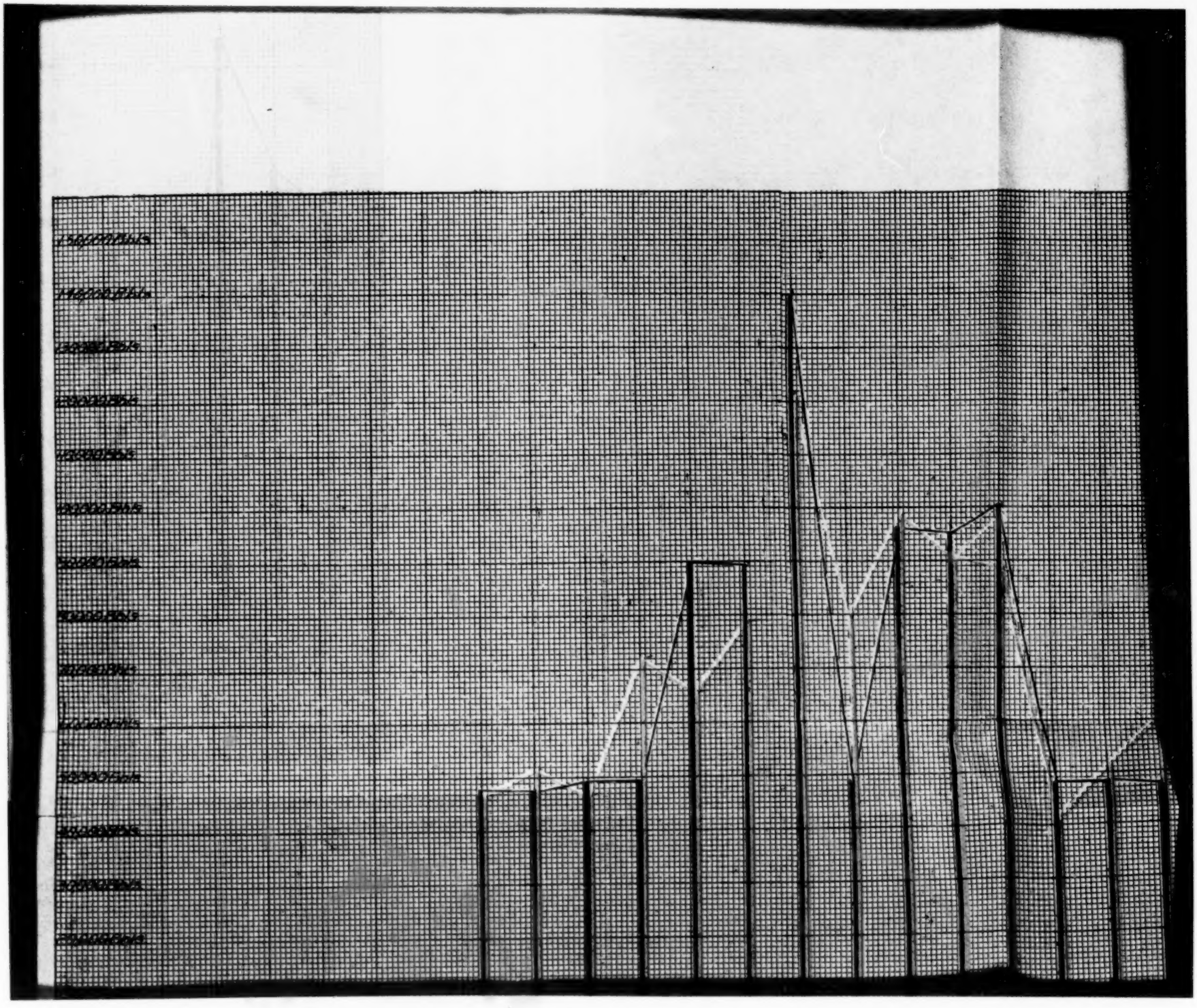


EXHIBIT 1
YEAR 1924
YEAR 1925



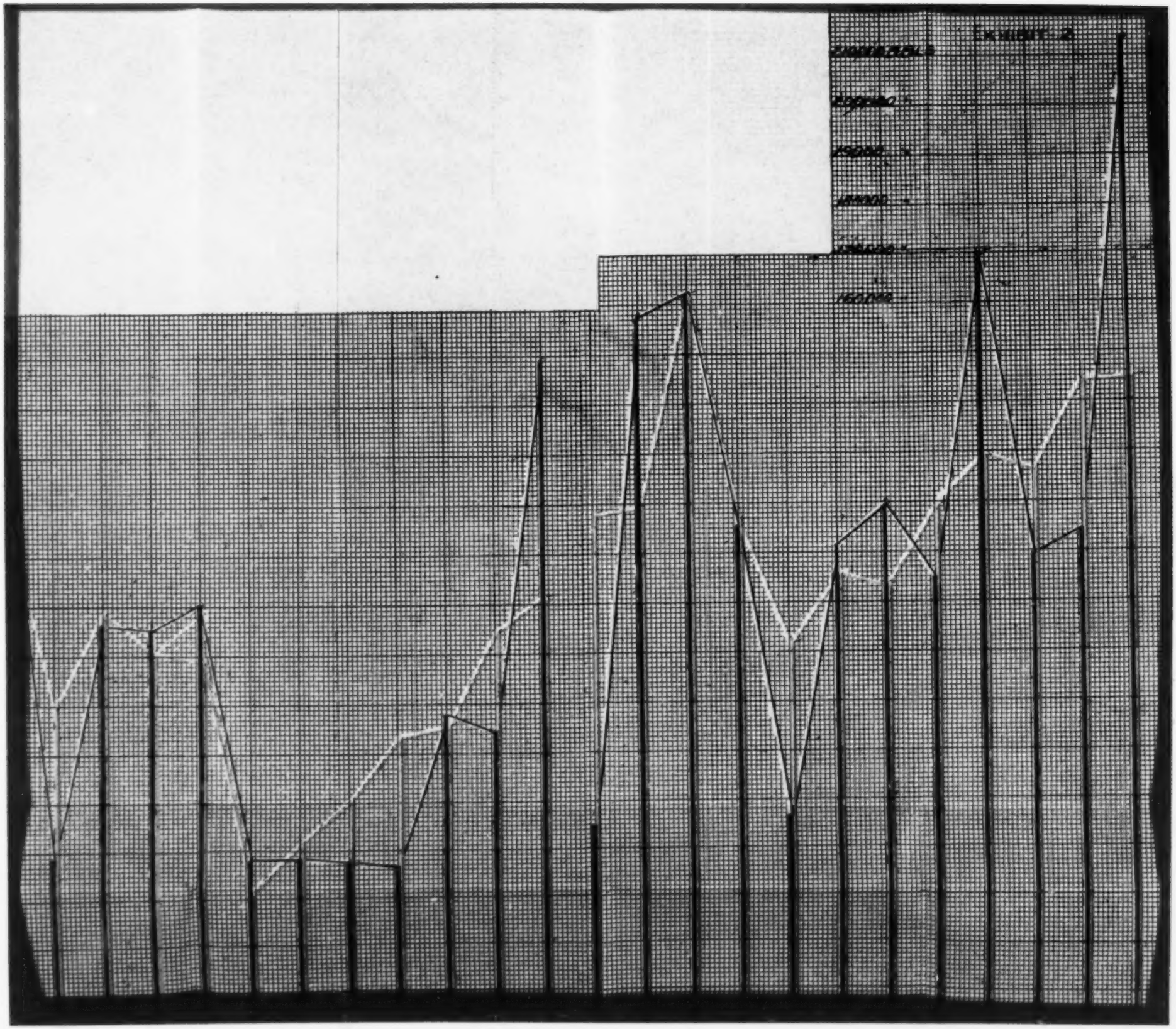
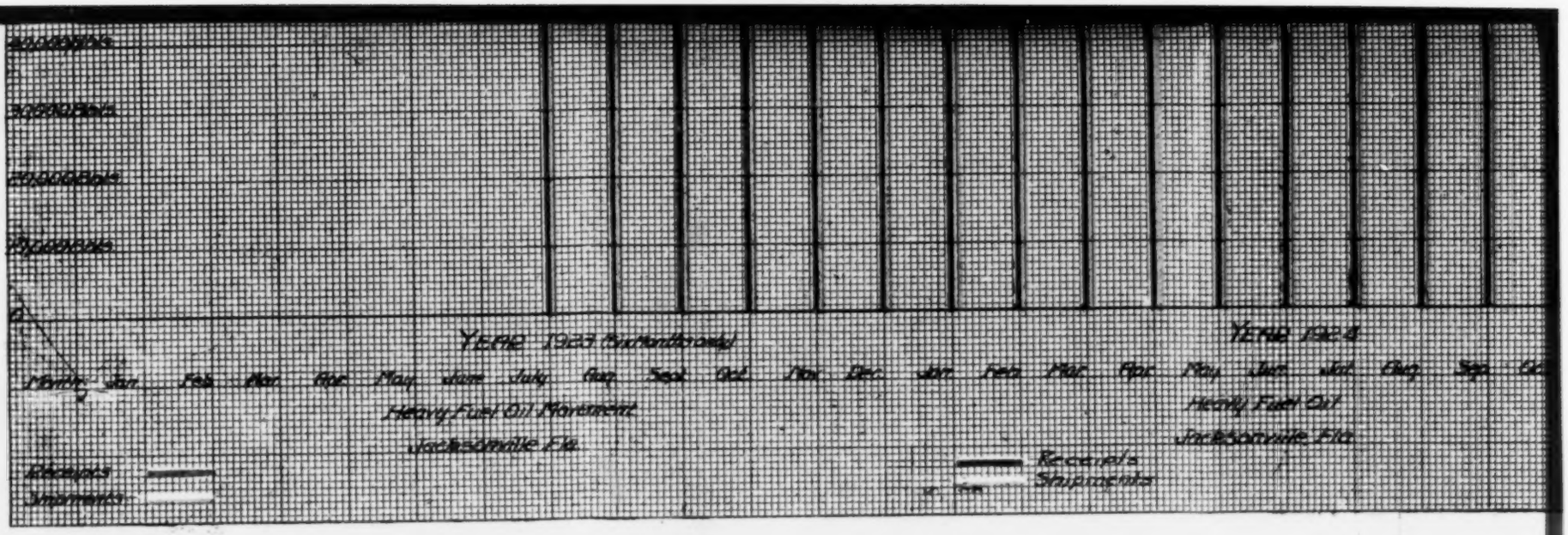
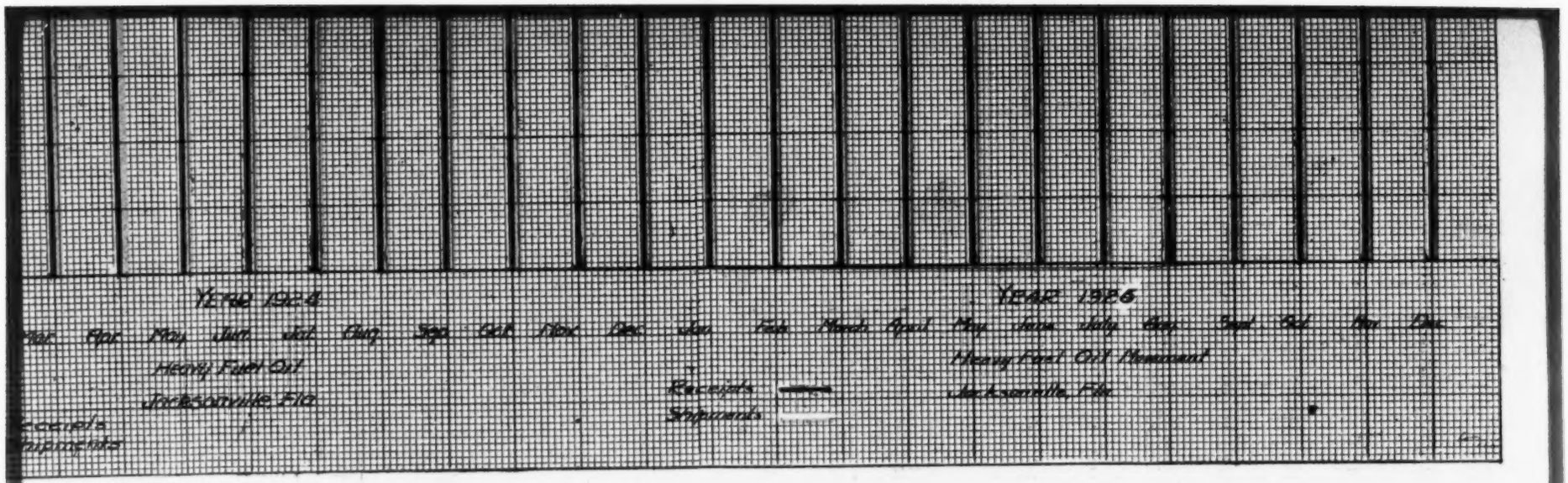
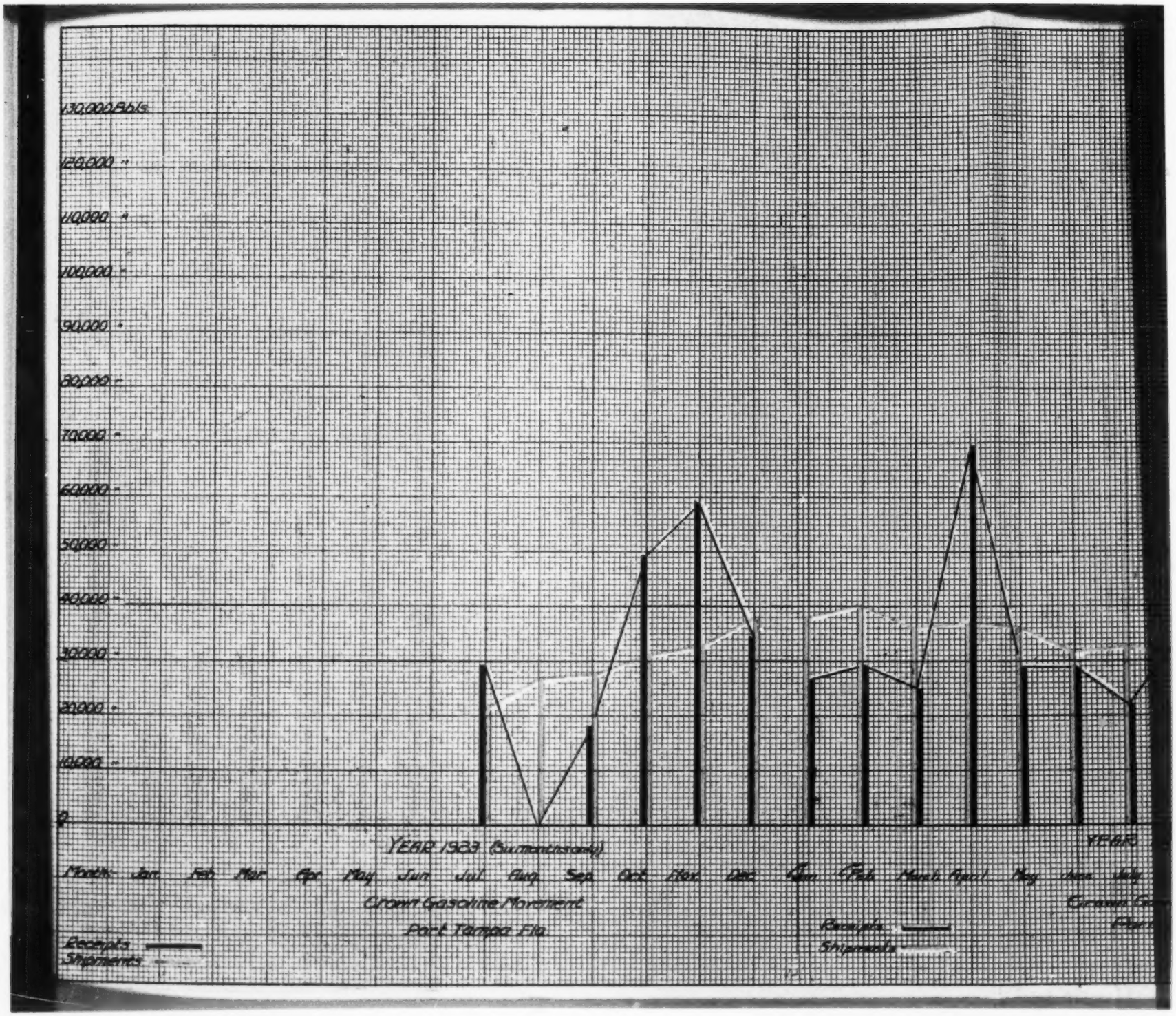


EXHIBIT 2


Months
Jan.
Feb.
Mar.
Apr.
May
June
July
Aug.
Sept.
Oct.
Nov.
Dec.
Jan.
Feb.
Mar.
Apr.
May
June
July
Aug.
Sept.
Oct.
Years 1923 Outstanding
Years 1924
Heavy Fuel Oil Movement
Jacksonville Fla.
Heavy Fuel Oil
Jacksonville Fla.
Receipts
Shipments
Receipts
Shipments


YEAR 1924
Heavy Fuel Oil
Jacksonville Fla.
YEAR 1926
Heavy Fuel Oil Movement
Jacksonville, Fla.
Receipts
Shipments


130,000 Bbls
120,000
110,000
100,000
90,000
80,000
70000
60000
50,000
40,000
30000
20000
10000
0
YEAR 1923 (Summarized)
Month: Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec
Crown Gasoline Movement
Port Tampa Fla.
Receipts
Shipments
YEAR
Jan Feb March April May June July
Receipts
Shipments

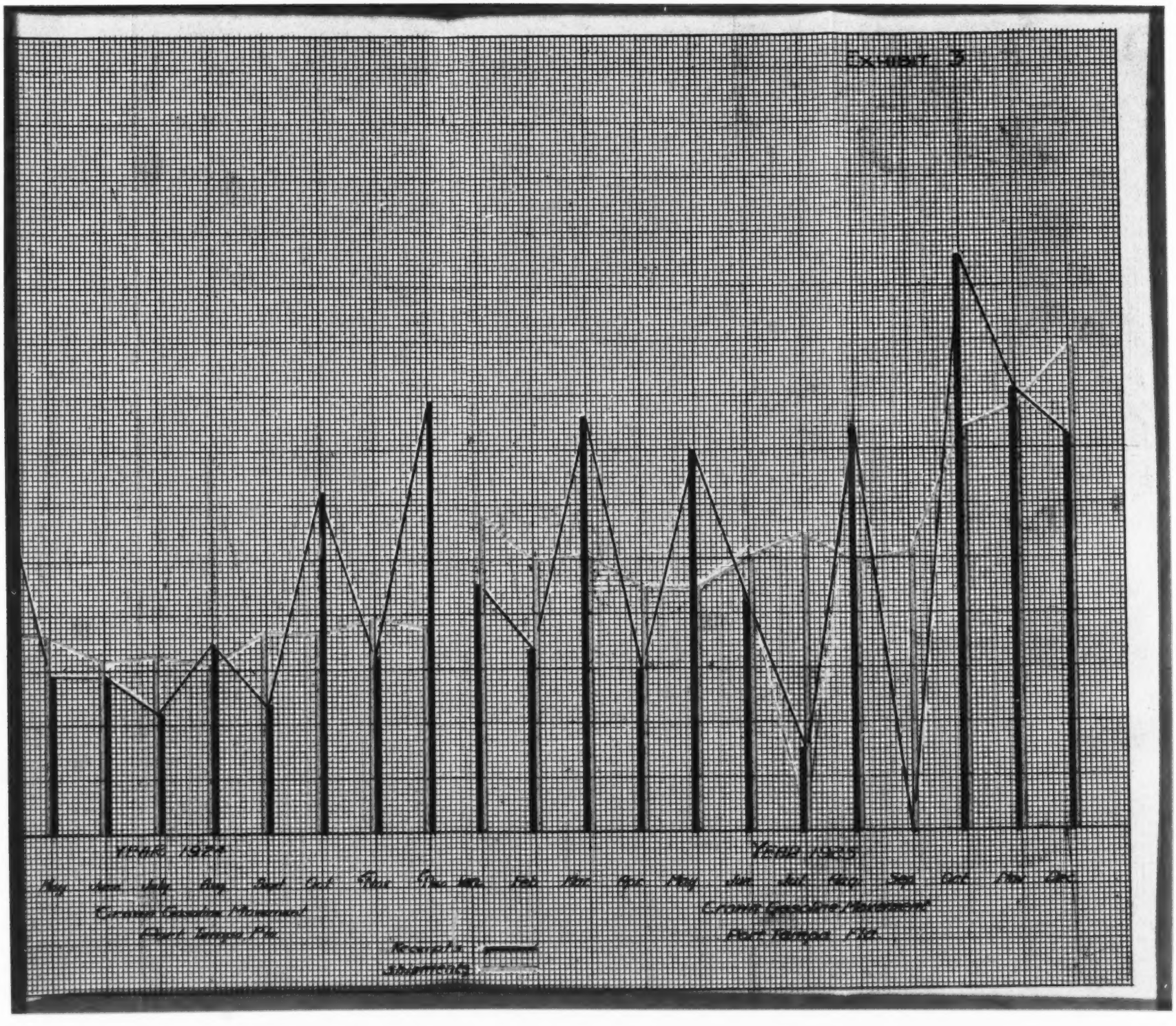
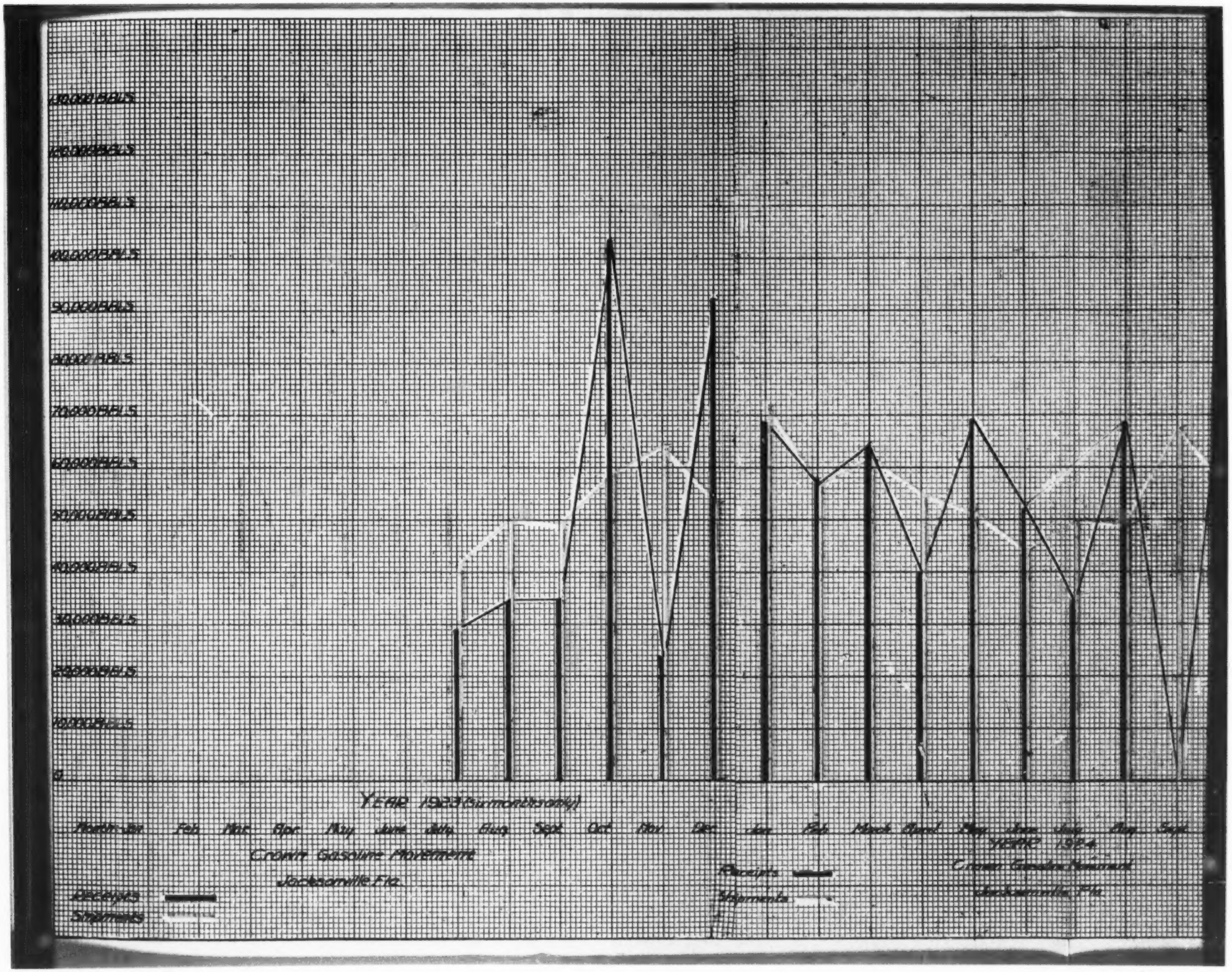


EXHIBIT 3
YEAR 1924
YEAR 1925
May June July Aug. Sept. Oct. Nov. Dec. Jan. Feb. Mar. Apr. May June July Aug. Sept. Oct. Nov. Dec.
Current Gasoline Movement
Past Years File.
Current Gasoline Movement
Past Years File.


Year 1923 (Six months only)
Month Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec Jan Feb March April May June July Aug Sept
Year 1924
Crown Gasoline Movement
Jacksonville Fla.
Receipts
Shipments
Crown Gasoline Movement
Jacksonville Fla.

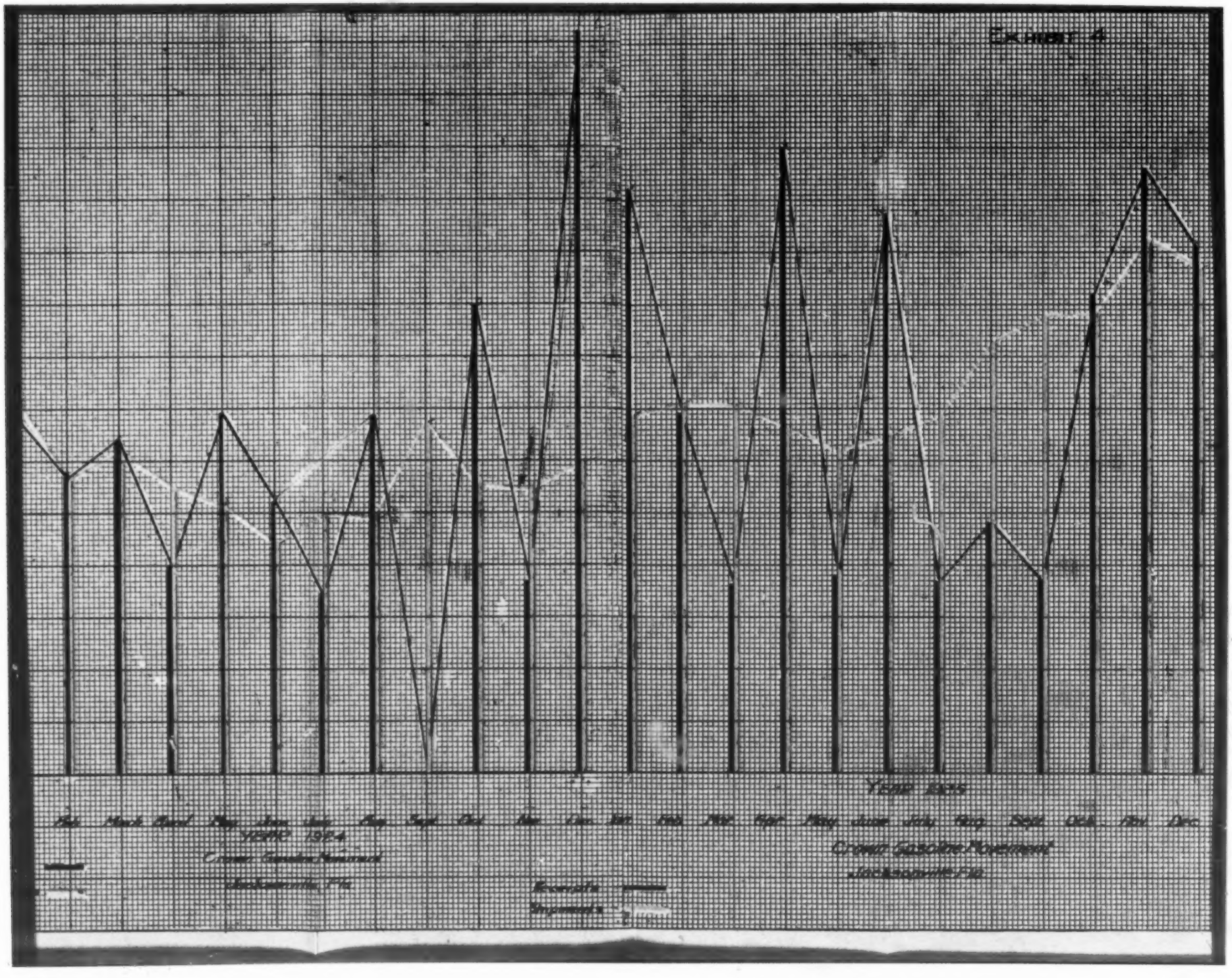


Exhibit 4
Year 1924
Year 1925
Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec
Crowell-Collier Publishing Co.
Jacksonville, Fla.
Crowell-Collier Publishing Co.
Jacksonville, Fla.

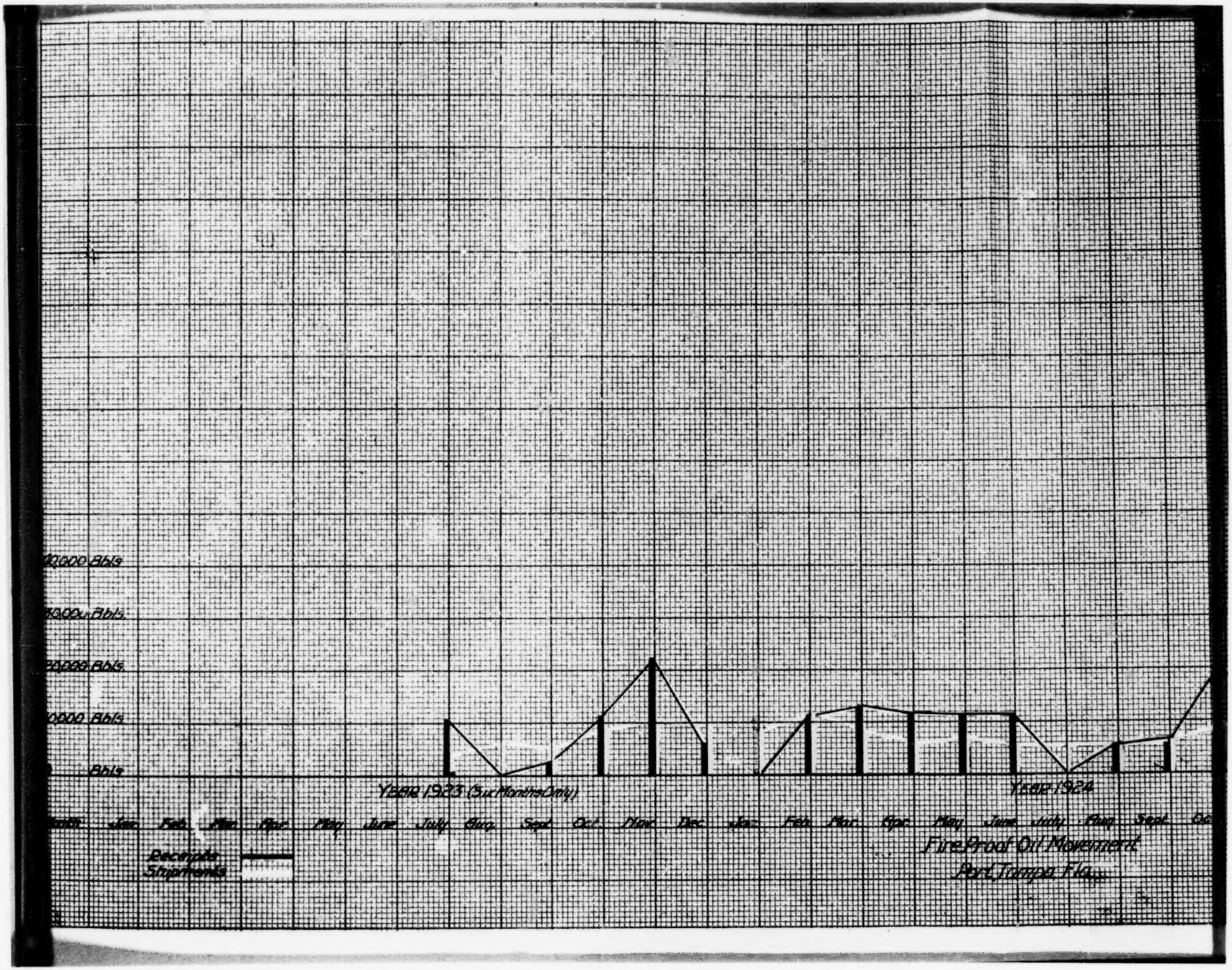
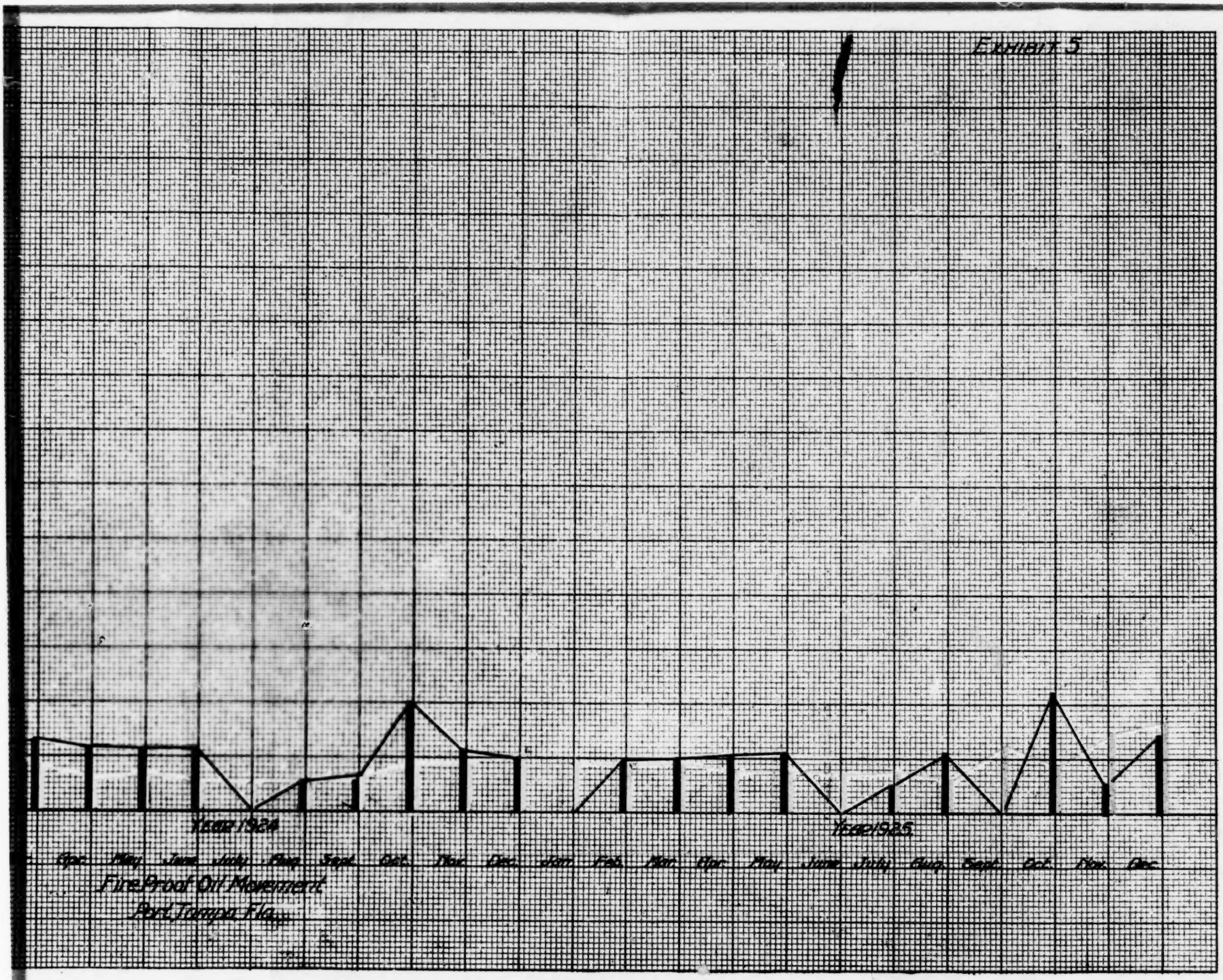
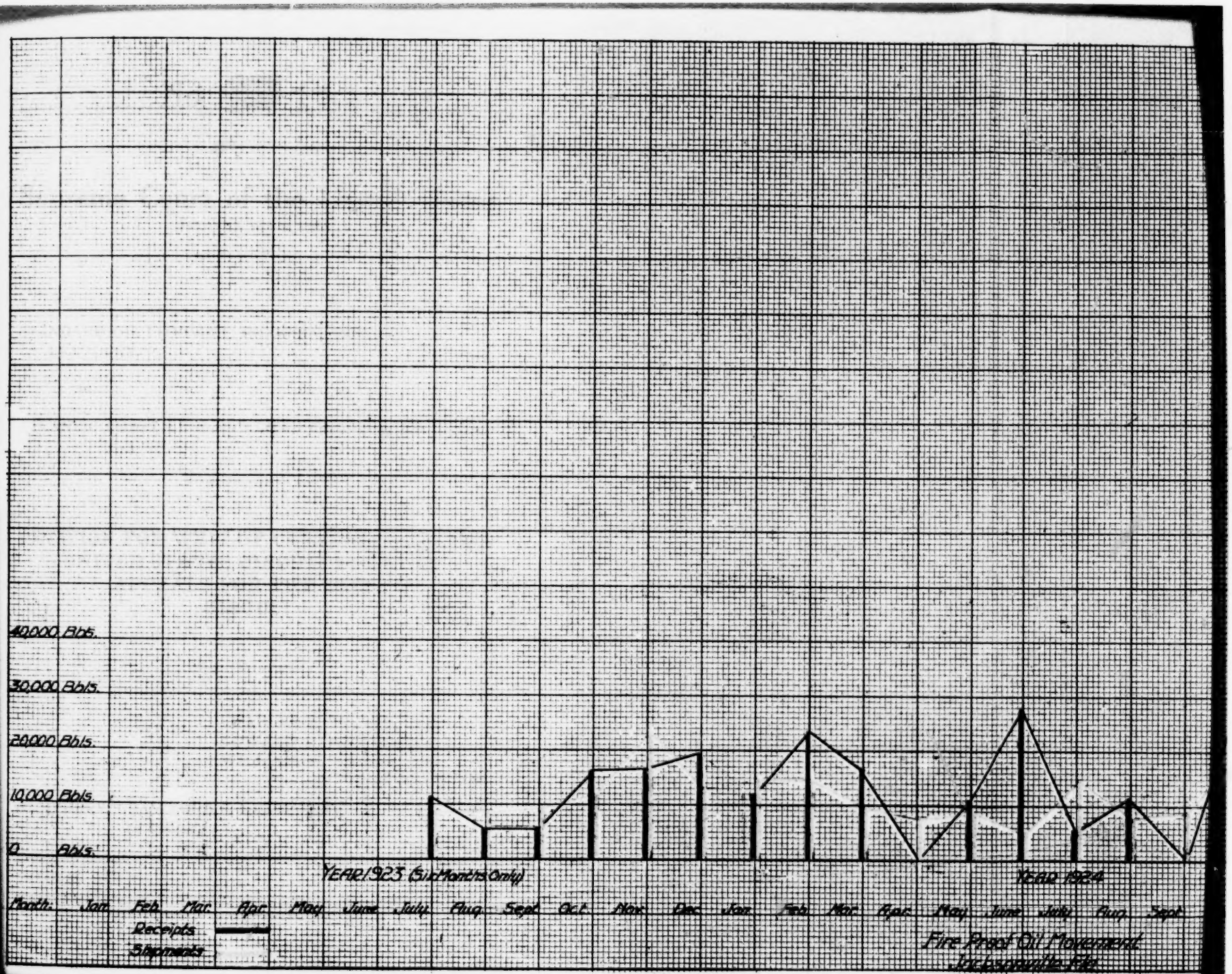

Bbls
Bbls
Bbls
Bbls
Bbls
Year 1923 (5 months Only)
Year 1924
Jan. Feb. Mar. Apr. May June July Aug. Sept. Oct. Nov. Dec. Jan. Feb. Mar. Apr. May June July Aug. Sept. Oct.
Records Shipments
Fire Proof Oil Movement
Port Tampa Fla.

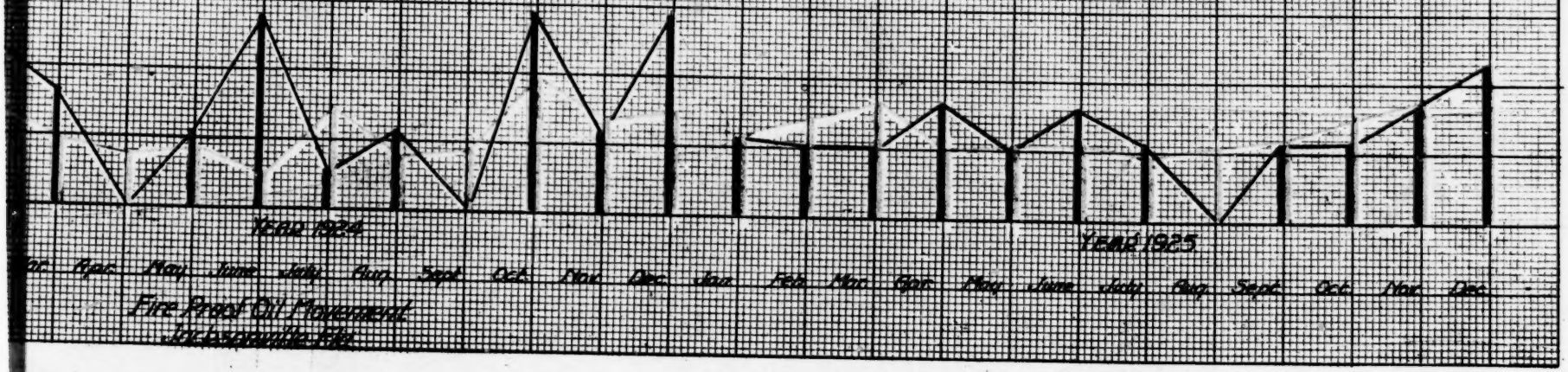
EXHIBIT 5


Year 1924
Year 1925
Apr.
May
June
July
Aug.
Sept.
Oct.
Nov.
Dec.
Jan.
Feb.
Mar.
Apr.
May
June
July
Aug.
Sept.
Oct.
Nov.
Dec.
Fire Proof Oil Movement
Port Tampa Fla.


40,000 Bbls.
30,000 Bbls.
20,000 Bbls.
10,000 Bbls.
0 Bbls.
YEAR 1923 (Six Months Only)
YEAR 1924
Month: Jan. Feb. Mar. Apr. May June July Aug. Sept. Oct. Nov. Dec. Jan. Feb. Mar. Apr. May June July Aug. Sept.
Receipts
Shipments

Fire Proof Oil Movement
Jacksonville, Fla.

EXHIBIT 6



Fire Proof Oil Movement
to Louisville Ky.